Paddock's case, 6 Rep. 25, has already been stated to the effect, that from a judgment of outlawry against four, the proper proceeding in error is by separate writs, and a joint writ is improper.

Bushell, Hurstwayt & Brand v. Yaller, Cro. Car. 408, is in full as follows:

"Error of judgment in the common pleas by Bushell, the defendant, and Hurstwayt and Brand, the bail, in the common pleas against Yaller.

"Grimston assigned for error, that no capias was awarded against the principal, and yet a *scire facias* issued against the bail and judgment against them. It is now moved that this writ of error brought by the bail and principal, was not good, for they ought not to join in a writ of error; for the bail may not avoid the judgment against the principal by any error which is in the proceedings, and the principal hath nothing to do with the judgment against the bail. *All the Justices* were of *that opinion* except Berkley, who doubted thereof because, by the judgment against the principal, the bail is damnified, wherefore he conceived they should join in error to avoid the principal judgment. But he agreed that the principal ought not to join in a writ of error to reverse the judgment against the bail. And afterward he consented with the other Justices, that a writ of error lies not in this matter, wherefore it was abated."

In Cox v. U. S., 6. Pet. 172, a judgment was rendered jointly and severally against the estate of John Dick and Nat. Cox for $20,000 and costs, and judgment against Nat. Dick and James Dick for $10,000 each and costs.

"The judgment debtors severally sued out writs of error and separate citations were issued and served." Motion to dismiss denied.

Now if all the parties here were necessary to give the jurisdiction, one writ could not derive any aid from another suit.

Two suits in the same court cannot aid each other. Each must stand on its own bottom.

Then the decision is, that a joint and several judgment against four parties, may be brought up by writ of error separately, and that the non-joinder is not fatal.

This is the earliest case on the subject of non-joinder in the U. S. Supreme Court Reports.

Also this case shows affirmatively that neither party was unwilling to appeal, yet all this was held immaterial, and the motion to dismiss denied.

Hanrick v. Patrick, 119 U. S. 156, Anno 1886, Matthews, J. This case is distinctly in point upon the case before the court. It was a suit to try title to real estate. Intervenors came into the court who claimed under the plaintiffs, but adversely to them (claiming that the title of the plaintiffs had passed to them). Therefore, their title, though a perfect defense against the plaintiffs, was adverse to the co-defendants. Held, that they could maintain error, from a judgment in favor of the plaintiffs below, without joining their co-defendants. Though the judgment against the appellants and the other defendants below was single, yet it was upon different and distinct issues, and joint only in form and not in substance. There the co-defendants were exactly related, as Price and Ayres are here: co-defendant, adversely interested. There the *res* was the same also. The argument might well end here, for this case is on allfours with the present.

Next in order is the case of Todd v. Daniel, 16 Pet. 521, Anno 1842. Story, J. Appeal by five; four abandoned the appeal before any step taken in court of error; (case for summons and severance by common law). One was held without more, entitled to pursue the appeal. "Otherwise an irreparable injury might be inflicted upon him for which the law would not afford him any redress. The decree in this case is in fact against him as principal and against the other defendants in

aid of him, for distinct portions of the purchase money received by them, under the contract of sale made by Todd." * * "The decree may be entirely right in regard to the other defendants, and yet it may be erroneous as to Todd. He has, or at least may have, a distinct and independent interest in the controversy in respect to which he is entitled to be heard in this court."

The abandonment of the appeal by part of appellants was below, and part in the court above. This was treated as equivalent to severance.

This was a case on contract, and it is held to be in compliance with the rule requiring severance.

What the court holds as equivalent is this: "A part of the defendants who originally claimed the appeal, before any further proceedings, abandoned their appeal."

This does not show whether they did any affirmative act of abandonment, or merely failed to take active steps to prosecute it. What follows shows this latter is what the court means: "And the residue of them, excepting Todd, have since the session of this court abandoned their appeal, and Todd only has entered his appearance." Now, they could not have actively abandoned the appeal without an appearance, which is negatived by the statement. Besides, further on, the opinion says: "the appeal having been deserted" by all but Todd.

The original edition of the reports shows, in the statement of Mr. Davies, who moved for the appellee to dismiss the appeal, that there was no affirmative action. He stated that, "The appeal had been actually entered in the circuit court in the names of the appellants mentioned in the record; but that there were other defendants in the circuit court against whom the decree had been rendered, who had not joined in the appeal, not having any regular notice of such appeal. They were Hayes, Gouch and Westcott."

The abandonment by those joined below was by notice to complainants' counsel, and by no act in court. The counsel for defense says: "If others had withdrawn, or if some of these did not enter an appeal, the party who now asks to maintain it should not be injured by this condition of the case." These statements are wholly inconsistent with any affirmative action. In this case there was nothing of record to bar the right to subsequent appeal by the non-joining parties, and the acts *in pais* were subsequent to the appeal.

In Forgay v. Conrad, 6 How. 201, per Taney, Anno 1847, the court held that two defendants having appealed without four other defendants, the appeal was good, they having a separate interest.

The bill was filed by the assignee of a bankrupt to set aside sundry deeds made by the bankrupt, for fraud.

Among the deeds set aside is one to Ann Fogarty, who subsequently conveyed to Forgay. They appealed without the bankrupt or either of three other defendants, who held separate property by several deeds.

This is a case *ex contractu*, but the contracts are several; but it shows the plasticity of the rules of the court, when the substantial ends of justice are to be reached. It was a case where there was an award of execution in the court below for possession of two lots in New Orleans and sundry slaves fraudulently conveyed to appellants, and an order to the clerk and master to take an account of the rents and profits of the lots and negroes. The same relief, the same execution and the same order to account was entered by the same decree as to three other defendants who did not join in the appeal.

It was held that this was a final decree, and as the three other defendants "claimed other property conveyed to them at different times and by separate conveyances, it was not therefore necessary that they should join in this appeal."

In other words, the court holds that substance and not form must control.

The case of Brewster v. Wakefield cites Forgay v. Conrad, 6 How. 201 (1859). In this case the bill or petition was filed to foreclose a mortgage and collect two notes secured thereby, and the question involved was as to the proper mode of counting the interest due on the notes. Subsequent mortgagees or lienors were parties to the suit, and the decree settled their respective rights.

The question of non-joinder in appeal is made in the brief of appellees thus: "It is a case in which there are several defendants claiming in the same right, immediately or derivatively, against whom the same joint decree was passed, finally settling their rights, and the appeal is prayed by one only. An appeal will not lie in such a case by one." Citing Owings v. Kincannon and Todd v. Daniel, L. C. P. Co., Bk. 16, 302.

This statement of the points made by counsel is fuller in L. P. C. than in the original report.

The court, Taney, C. J., say: "Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in question should join in the appeal. They were *not necessary in a proceeding in equity to foreclose the mortgage* and none of them have appeared to the suit to contest the claim of Wakefield." Citing Forgay v. Conrad, that a defendant in equity whose interest is separate from that of the other defendants, may appeal without them.

Here the court recognize the propriety of joinder in an original suit as the test of joinder in appeal.

Norwich & W. R. R. Co. v. Johnson, 15 Wall. 8, Anno 1873, Chase, C. J. This case is of no import. The question might have been important in the State Supreme Court, but in that court it was not noticed, and the appeal from that court to the Supreme Court U. S., was by and against all the parties to the decree appealed from. But if the non-joinder in the State

court appeal went to the jurisdiction, the decree was void. The court, however, do say that the trustee to secure bonds, was not a necessary party, as he had no interest. Yet he was the holder of the legal title, without whom the legal title could not be passed by the decree, and he could not be required to convey by a proceeding to which he was not a party.

Marsh v. Nichols, 120 U. S. 508, Anno 1887, is precisely on the same state of facts. Appeal by part to State Supreme Court, and by all who went to that court from a decree against all.

Milner v. Meek, 95 U. S. 252 (444) was this: Moore conveyed certain lands to Milner to hinder and delay creditors. Walker sued Moore in the State court and attached the lands conveyed to Milner. In 1870 Long sued Moore and attached the same lands. In 1872 Milner reconveyed the lands to Moore, and took a mortgage on them to secure a debt due to him. Subsequent to this sundry judgments were taken against Moore which were liens upon his equity of redemption, and in 1870 he executed a mortgage on the property to one Shepherd. Moore was adjudged a bankrupt in 1872, and Meek was appointed his assignee. Leave was granted Walker and Long to proceed to judgment in their cases against Moore, which they did. In 1873 Meek filed a petition in the bankrupt court, held to be a bill in equity, asking among other things that Walker, Long and many others be made defendants to the petition, and that the court order a sale of the property to satisfy the liens of the defendants after they had been adjusted. The case was referred to the register to determine the priority of the liens of the creditors. Walker, Long, Meek, Milner and other creditors filed answers. In 1874 the register made report against the mortgage of Milner, against the liens of Walker and Long, and he also reported the amounts and priority of other creditors. Milner, Walker and Long objected to this report. The court confirmed this report. Long, Walker and Milner appealed to the circuit

court. That court affirmed the action of the district court; and thereupon Milner alone appealed to the Supreme Court. And the assignee moved to dismiss the case because the other lien creditors who were parties to the proceedings below were not parties to the appeal. The court say in disposing of this motion: "Milner alone appealed. But his appeal brings up so much of the case and such of the parties as are necessary for the determination of his rights. The motion to dismiss is therefore denied."

In the present case Ayres alone appeals, but his appeal brings up so much of the case and such of the parties as are necessary to the determination of his rights.

City National Bank v. Hunter et al., 129 U. S. 557 (752). O'Neil, a cattle dealer, borrowed from Hunter, banker, as the latter claimed, $18,000 and gave a mortgage on his cattle. He also borrowed $9000 from the appellant's bank. Wanting to sell the cattle to Dawson, the four parties met, and it was agreed that O'Neil might sell to Dawson and that the two banks would share the proceeds of the sale pro rata. Dawson sold some $4000 or $5000 worth of the cattle, and then for the first time, as Hunter asserted, O'Neil disputed one-half of his claim of $18,000. Thereupon Hunter filed a bill in the State court claiming his right to repudiate the agreement upon the ground that he was being defrauded by Hunter and the appellant bank. The case was removed to the United States Court, where pending the suit O'Niel died, and his wife as administratrix was made a party. The circuit court held that Hunter was entitled to his $18,000, and the fund should be distributed accordingly between Hunter's bank and appellant bank. From that decree the City Bank and Dawson appealed, but Mary O'Neil did not appeal. The court say:

"It was proper to allow the bank and Dawson to appeal between themselves and Hunter bank, as with the matters

complained of by the bank and Dawson, O'Neil's estate had no concern." [Yet this was a joint decree and a single *res.*] "The total balance of indebtedness due from that estate, after all payments and money realized were applied, would be the same irrespective of the proportion of such balance found due to each of the creditors. The decree was severable in fact and in law, and the bank and Dawson were entitled to prosecute their appeal without joining their co-defendants, who did not think proper to question the judgment.

"And while, in order to a correct distribution of the fund, it becomes necessary to find the indebtedness of O'Neil to Hunter and to the appellant bank, this is not a determination of the amount remaining due after the distribution is made, with intent to decree against O'Neil's estate therefor, as the decree originally entered, so far as relates to that, stands unappealed from by either of the parties concerned."

Basket v. Hassell, 107 U. S. 602, Anno 1883, Matthews, J. Held that parties to a decree who had no interest in either affirming or reversing the decree are not necessary parties. "It is apparent that the sole controversy is between the present parties to the appeal," and the opinion proceeds to show this. It is not a case in point upon the present case except so far as it shows the spirit of the decisions, though in this sense it is in point here. Price has no interest whatever in reversing or affirming the judgment against Ayres. If it is reversed as to Ayres, it does not help Price; the case is ended as to him. If it is affirmed, he is no more concluded than he was before; it does not matter in the least to him who succeeds. If Polsdorfer has judgment, Price stands with a conclusive judgment below against him. If the case is reversed the conclusive judgment against him stands. If Ayres fails to reverse, he may still sue Price and recover against him in ejectment, if he has the better title to any land outside of the lines recovered by Polsdorfer. If he reverses the case Price would still have to give up to Polsdorfer. If on a new trial Polsdorfer fails to

recover against Ayres, then Ayres would still have to sue Price for the land that Polsdorfer has not recovered from Price. In no possible event has Price any interest in this controversy.

But this court is not sitting to protect Price. Price is not one who asks its aid. If this court requires him to come into this case and will not proceed without him, it is not from any solicitude about him or his interests—it is the parties before the court that this court is acting for and between. If a party is not joined as co-plaintiff who ought to be, the court dismisses the case, not on his account, but on account of the defendant in error, plaintiff below, because for want of Price his judgment will not be as beneficial to him as it would be if he, Price, were here. But how could Polsdorfer be benefited by bringing in Price? Suppose Price was here and he could maintain his claim against Polsdorfer. Would that do Polsdorfer any good? Suppose he could not, would a judgment of affirmance here as to Price be any more conclusive as to Price than the unappealed judgment below? If we are right, and the protection of the adverse party is the ground of the rule that the parties must join, then his protection is more complete by the omission than by the joinder.

On the other hand if the court *is* solicitous about Price and he is a dead cock in the pit, what harm is done to him? We cannot make him any deader by either success or failure. He can gain nothing by our success, he can lose nothing by our failure. What does Polsdorfer want with him? To be reversed by him and give him another chance? What does he lose by not having him? As he is, Price is squelched effectively and forever. But, he says by this motion, I have the right to have him here. This court must say to him, his absence here can by no possibility do you any harm, but his presence may do you much harm. It may put to hazard what you have now settled against him. In any possible event it

cannot make a judgment more obligatory, conclusive or final than the one you now have. What do you want with him? O, I just want to get rid of Ayres. But you can't get rid of him because you want to, though you may if the absence of Price is an injury to you—if his presence is necessary to enable us to do you full justice. Here, his absence is a benefit. Price cannot be injured by any judgment here; his case is cooked already. He is entitled to no benefit here; he has not asked it.

Held in Birdsong v. Birdsong, 2 Head 289, 302, not to be a right of the party, but a rule prescribed by the courts to themselves.

But it may be said in reply: What you say is true, but it was not so when you took the writ of error; and this is true. But is it an answer? Does not this motion to dismiss reasonbly demand an existing right to the relief asked? Every word of our reasoning applies to the state of the case as it was when this motion was made. If it had been made at the first term, when it was possible that Price might still bring error, there then existed a benefit to Polsdorfer to be derived from the motion to prevent a separate appeal by Price, but when the motion was made that benefit was precluded by the extinguishment of Price's right to a writ of error. Shall he have a remedy of which the purpose has wholly vanished, when he did not ask for it while it would have answered a purpose? The technical rule as to pleas in abatement is founded on reasons weak compared to this. A remedy must be used while some remnant of the evil continues to exist.

But further, Price took no bill of exceptions. From the time then that execution could issue, *i. e.*, the end of the term, Price by that failure was precluded from a writ of error.

Gilfillin v. McKee, 129 U. S. 303, Anno 1895, Brown, J. In this case the motion to dismiss was denied on the ground that the interests of the parties who were not joined in the appeal were separate, although they were so far connected

that no complete decree could be made on the appeal, but it had to await the adjustment of part of the matters in the same case involved in another appeal in which the non-joining appellants were concerned.

The appeal involved this: A large fund had been recovered and had gone into the hands of one McKee. A part of this fund had been appropriated by the beneficiary to the widow of one of the agents who, under a conditional contract to be paid compensation if he recovered the fund, had rendered valuable services but did not live to recover the fund, and so was entitled to no compensation legally. The administrators of that agent claimed that the amount allowed the widow was really compensation and ought to go to them; the widow claimed that it was gratuity and belonged to her; held, that the widow, administrators and the holder of the fund were the only parties necessary to the appeal.

Two other parties, Lamon and Latrobe, were jointly interested with the widow, as they were adjudged by the decree to be entitled to part of the fund adjudged to her. But she did not deny their interest—did not appeal from that part of it, and they did not join in the appeal, although they were jointly interested in the fund to be recovered. But the amount of their compensation was involved in another appeal from the same decree, and the court say: "The reversal of the following case may make it necessary to readjust the amount due to *Lamon and Black*, and consequently our decree on this case must be for a reversal to await the disposition of the following case and for further proceedings in conformity to this opinion."

It is hard to conceive any case stronger than this in favor of making exceptions to the rule. In fact, it disregards the whole basis of the rule; the delay of the adverse party; the tale twice told to the court; the inability to make a complete decree; the identity of the *res*; all but the consideration that

the court will not on technical grounds turn parties out of court without a decision on the merits. In other words, this case does not seem to leave the rule a leg to stand upon, except where the interest grows out of partnership or a joint contract. And the case is distinctly conclusive against the position that the singleness of the *res* is a ground for the application of the rule; in fact, every case reported in which the motion has been denied is a case in which the *res* is single.

Germain v. Mason, 12 Wall. 259. Germain and eighteen others were defendants. The suit was to recover a balance due by Germain, and to enforce a lien against a house and lot for work done and materials furnished to Germain in building the house. The other eighteen defendants were made parties in the lower court, because they claimed to have some interest, claim or lien in, or on the encumbered premises; and they were prayed to be bound and foreclosed of all equity, etc. The court decided that the lien of the plaintiffs was superior to that of all other persons, and gave judgment *in personam* against Germain for the debt and for a sale of the property on which the lien was claimed, and that out of the proceeds payment should be made to the plaintiffs. Germain sued out a writ of error without joining the other defendants, and it was held that he could properly do so. Here the *res* was the same, and the eighteen unjoined defendants had a claim upon the fund.

In R. R. Co. v. Johnson, 15 Wall. 8, a holder of bonds, secured by mortgage on the railroad, and by the transfer of stock to two persons as trustees, sued in equity praying a foreclosure of the mortgage and a sale of the stock, the railroad company and the trustees being defendants. There was a decree against the company or mortgagor, personally, and against the other defendants trustees, and it was held that the railroad company could maintain an appeal from the decree without joining the trustees. Here the *res* was single.

We have examined, as we think, all the cases reported on this question from the circuit courts of appeal—eighteen in number. Of these, seven distinctly hold that persons more connected than Ayres and Price need not join, and deny the motion to dismiss. Eleven cases hold that the interest of the parties below is such that the decree cannot be complete without concluding their interest, or completely guarded without hearing them; and the motion to dismiss is allowed. The seven are cases distinctly maintaining our contention. The eleven are perfectly consistent with it, and inconsistent with the opposite view in this, that they all assume the necessity of showing a common interest.

But we find in one case an opinion by Jenkins, J., which ably reviews the cases and follows the rules as administered in the latest cases in the Supreme Court. This is the case of the L. & N. R. R. v. Pope, 74 Fed. R. 1, from which we quote:

"The order allows the appeal 'to said defendants above named' to operate as a supersedeas upon giving bond in a specified amount. It does not appear from the record that Morris Sharp, trustee, or Erastus W. Hubbard, were in any way notified of this petition, or were in any way asked to join in the appeal, or that they or either of them refused to join therein. Without doubt all parties to a joint decree in equity must join in the appeal, unless upon notice the court grants a separate appeal to a single party. Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39; Beardsley v. Railway Co. 159 U. S. 123; 15 Sup. Ct. 786. But if the decree be several in form or substance, and the interest represented by each defendant be separate and distinct from that of the other, any party may appeal to protect his own interest. Gilfillan v. McKee, 159 U. S. 303, 312; 16 Sup. Ct. 6. The reason of the rule is stated to be, first, that the successful party may be at liberty to proceed to enforce his decree against those not desiring a review; and second, that the appellant tribunal shall not be required to decide a second or third time, the same question in the same record.

"The precise question here is substantially this: Whether a decree establishing a lien upon real property is to be deemed joint or several as between a mortgagor and a mortgagee of the property, so that either may appeal from the decree without joining or without severing as to them. In Brewster v. Wakefield, 22 How. 118, a bill was filed to foreclose a mortgage upon real property, to which subsequent lienors were made parties. There was no defense by the appellant (the mortgagor), but by his appeal he presented a question with respect to the rate of interest that the debt should draw after its maturity. The defendants who held subsequent liens upon the premises were not parties to the appeal; but there was no severance as to *them*. The court held (Mr. Chief Justice Taney) that the subsequent lienors were not necessary parties to the proceeding, and had not appeared to contest the claims of the complainant; and that, had it been otherwise, the question in controversy was the amount of the debt due from the appellant, and upon the authority of Forgay v. Conrad, 6 How. 201, held that the decree was separate, because the interest of the appellant was separate from that of the other defendants. In Germain v. Mason, 12 Wall 259, the suit was brought to recover for work and materials furnished to a building, and for the establishment of a mechanic's lien thereon, prior to other lien claimants who were made parties defendant. The court ruled that Germain, the owner, might appeal alone without the presence of the other lien claimants, notwithstanding that the debt of the complainant was decreed to be a paramount lien on the realty, as against all other defendants. So, also, in Milner v. Meek, 95 U. S. 252, suit was brought by an assignee in bankruptcy to sell the land of the bankrupt, and for the adjustment of the liens upon the land against all lien claimants and general creditors. The decree determined the amount and priority of the several liens. It was held that one lien claimant might appeal without the presence of the other.

"The question is discussed in a well considered opinion by the Court of Appeals of the sixth circuit, in the case of the Mercantile Trust Co. v. Adams Exp. Co., 16 U. S. App. 37, 69, 7 C. C. A. 3, and 58 Fed. 6, in which the authorities are

assembled and reviewed. Here the decree established a lien upon the railway in question, and adjudged that all rights of the Louisville, New Albany & Chicago Railway Company, and of Morris Sharp, trustee, were subordinate to that lien. It does not provide for any enforcement of the lien established in case of failure of the railway company to pay the amount decreed, but reserves the right to the complainant, in case of non-payment within a specified time, to apply to the court for further direction. It appears that the short line of railway involved had become incorporated into the through line of the Louisville, New Albany & Chicago Railway Company, between Chicago and Louisville. Whether, upon default in compliance with the decree, the court would direct a sale of the railway, or would take it into possession and sequester the revenues to the satisfaction of the decree, had not been determined by the court below prior to the appeal. So that, whether in fact Sharp, as trustee under the trust deed, was injuriously affected by the decree, would depend upon the nature of the ultimate proceedings to secure satisfaction of the decree. If such should be obtained through sequestration of the revenues of the road, and without sale of it, the trustee would not be injuriously affected. It may be said that it is clear upon the record that Sharp, as trustee, did not contest the complainant's right, but contented himself with asserting the trust deed against the appellant who held nearly all of the bonds, and in favor, as they state, of but two bondholders. The decree is in substance one against the railway company—establishes the claim due, and that in default of its payment the lien granted would be enforced against the property upon which the trust deed existed, and in some way to be thereafter determined. The case seems to be clearly within the rulings in Brewster v. Wakefield and Germain v. Mason. Sharp, the trustee, in no way excepted to the master's report, or to the decree so far as it determined the rights of the complainant below. Any appeal by him to review the decree in favor of the complainant would necessarily prove abortive. To join him, therefore, as an appellant would be useless, and the formality of severance would seem to be unnecessary. We think this decree to be so far separate that

an appeal was authorized without the joining of Sharp, trustee, as a party thereto, and without proceedings for severance. With respect to the defendant (Hubbard) it is only needful to say that the trust in him would seem to have been fully performed, and all interests of which he was trustee, vested in the present appellants. He has no possible interest in the controversy, and did not appear to, or defend against the suit; he is not a necessary party to the appeal. The motion to dismiss will therefore be denied."

Observe, the court says as to Hubbard: "The trust in him would seem to have been fully performed, and all interests of which he was trustee vested in the present appellants."

Observe also—as Sharp did not except—so Price took no bill of exceptions.

Now where is Price's interest? Is it not vested in Polsdorfer by his judgment below, or extinguished so far as Polsdorfer is concerned? If it is conveyed as by fine and recovery, Polsdorfer, as assignee of Price, represents and can protect that interest, and it behooves him here to support and prove Price's title as against Ayres. If it is extinguished by a final conclusive judgment of its nullity, then surely a nonentity needs no party in this court to represent it.

Take another view: Suppose Ayres and Polsdorfer were to meet and a compromise were proposed. Some one might ask, what will you do with Price? Polsdorfer would say at once, my judgment against Price stands; he can never question what I do. Ayres and I are all the parties needed to compromise this matter, and our settlement concludes the whole world. Polsdorfer can sell, give away, or at his will dispose of any claim that Price ever had. He stands in his shoes to all intents and purposes. Still, he wants him here to enable the court to do him, Polsdorfer, complete justice!!!

There is still another class of cases in which the Supreme Court discuss separate interests. These are cases where the

question is whether the interests of several plaintiffs against one defendant, or the interest of one plaintiff against several defendants, each severally liable for a separate sum, under the jurisdiction of the court of error, can be added together to make a sum sufficient to give jurisdiction, and the principles of joint interest and joint decrees or judgments are clearly set forth.

In Paving Co. v. Mulford, 100 U. S., at page 148 (591), Ch. Justice Waite says:

"We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into court, the proceeding is, in fact, against each of the several purchasers, to enforce his separate and distinct liability. It is a joinder of distinct causes of action against distinct parties. The same decree is to be entered against each, as in case of separate suits. The recovery, if any, must be against each defendant separately, for the amount he may personally be found to be accountable. Such being the case, the value of the matter in dispute with each defendant must be the sum for which he is separately liable. It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal. Seaver v. Bigelow, 5 Wall. 208 (595); Rich v. Lambert, 12 Wall. 347; Oliver v. Alexander, 6 Pet. 143; Stratton v. Jarvis, 8 Pet. 4.

"In such case the appeal of each separate defendant or complainant must stand or fall, according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. * * * For the purpose of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount invoked sufficient to give jurisdiction."

REVIEW OF THE CASES IN U. S. SUPREME COURT In Which Joinder Was Held Necessary.

The first reported case on the subject of non-joinder in error is Cox v. U. S., 6 Pet. 172. See supra p. 10.

The next case is Williams v. Bank, 11 Wheat. 414, Anno 1826. Error by one of several defendants upon a joint judgment in a joint action against them for money lent. Writ of error dismissed. Webster for motion; per Marshall, C. J. This case was *ex contractu*. No report of argument or reasons.

The next case was in 1833—Owings v. Kincannon, 7 Pet. 339. Six defendants were directed to convey and release to the complainant all their right, title and interest in a tract of land. Appeal dismissed.

This was evidently a suit *ex contractu*, in which the defendants were jointly bound to convey the land, as such decree could not have been upon an action *ex delicto*. It was most probably on a joint title bond, on which at common law all the contracting parties must have joined and been joined.

Deneale v. Archer, 8 Pet. 526, Anno 1834; per Marshall, C. J. *Scire facias* to revive a judgment. Judgment for plaintiff against Mary Deneale and several others. Writ of error by Mary Deneale "and others" (*sic*) held bad, but the court said they could have a new writ; and so by consent the writ was amended and decree for plaintiff in error upon the merits.

This is pretty strong against the question being jurisdictional, for objection to the jurisdiction cannot be waived. It is strong, however, that it was jurisdiction of the parties, which can be waived.

Deneale (Wilson's Heirs) v. The L. & F. I. Co. of New York, 12 Pet. 140, 1838. Held that writ of error by "the heirs of Wilson" is bad, and all the defendants not having joined, the

case must be dismissed. In this case the idea that the defect goes to the jurisdiction first crops out.

But this is exactly the case of U. S. v. Schoverlin, 146 U. S. 76, where the court held that in case of partnership, appeal in the name of A. B. & Co. could be amended. It is also directly against Deneale v. Archer last above considered.

There the suit was to foreclose a mortgage, and the right of the defendants was clearly joint. Per Taney. Baldwin dissented.

Smith v. Strader, 12 How. 327, 1851, does not show the nature of the suit, whether plaintiff or defendant was plaintiff in error.

Davenport v. Fletcher, 16 How. 142, 1853. Probably ejectment or a possessory action equivalent. La. Joint recovery.

Fletcher et al. v. Davenport et al., How., &c. Bond to an assignee who was not a party to the suit. Dismissed.

In Shannon v. Cavazos, Bk. 15, L. C. P. Co. 929, court held that a separate appeal by one party from a decree against several was not maintainable, but the subject matter of the decree and the nature of the interests in no way appear. This is not in the official reports.

Mussina v. Cavazos, 6 Wall. 773, Anno 1868, merely holds that an appeal with proper parties which does not show which was plaintiff and which was defendant below, is good. But it does show that the rule should be administered in the interest of justice, as does also Masterson v. Howard, 77 U. S. 416. Decree against two; one appealed. Bill to perfect title.

Downing v. McCartney, L. C. P. R., Bk. 19, 757, Anno 1870. Chase, C. J. Decree below dismissing bill filed by three; appeal by one; held bad and dismissed.

Here was a case in which the plaintiffs below were necessarily appellants. They had joined below. They had made

themselves joint parties and could not well deny that they ought to work together under the yoke they had voluntarily put on.

In The Protector, 11 Wallace 82, Anno 1871, Nelson, J., Swayne and Bradley dissenting, the appeal by one libellant in an admiralty case, whose joint libel brought by him jointly with others, was dismissed; one could not appeal alone. Of course if the libel was brought by parties who were necessarily joined, the same necessity would exist that they join in the appeal. Even if they had improperly joined, the common law would have bound them to abide by the consequence of their own folly. Estoppel by mistake, Popham, J., in 6 Rep. 25 supra. The two dissenting judges, however, held that it ought to be amended under the act of 1789, 1 Stat. at L. 73; and Congress in 1872, C. 225, have passed a more liberal act applicable to appeals in admiralty.

Hampton v. Rouse, 13 Wall. 187, Anno 1872, ejectment, merely states the rule; no facts reported except that the verdict, judgment and bill of exceptions were joint, and plaintiff in error is one of two defendants below. Chase, C. J.

Simpson v. Greely, 87 U. S. 152, Anno 1874. This was ejectment against landlord and tenant jointly for possession and for $4200 against landlord and $2600 against the tenants' part of the $4200. Clifford, J., dismisses the cause because the interest affected is joint, but says: "Cases arise beyond all doubt where only one of several defendants is affected by the judgment or decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error" may proceed alone.

Feibleman v. Packard, 108 U. S. 14, Anno 1882. Partners sue. Decree against them and part appeal. Held bad. The court say: "While parties against whose joint interest a decree is rendered must join, yet they show by the use of the

words, 'if the judgment affects them jointly and not severally,' that the exception to the rule exists." This is a case where limitation in the statement of the rule shows the exception.

Ex parte French, 100 U. S. 1, Anno 1879. Waite, C. J. Ejectment, but concerns separate interests in stay of execution for money judgments, and discusses severable interests in that connection, and holds against the objection that defendants with severable interests shown in the record were improperly joined. One matter in this case pertinent to the present is that stay of execution by one leaves execution free to issue against the other.

Mason v. U. S., 136 U. S. 581, Anno 1890. Joint judgment against McArthur, postmaster, and his securities. Writ of error by Mason, one of the sureties alone, dismissed and held to be unamendable. This was a joint liability *ex contractu*, and the writ of error was not even by the principal in the bond, but by one of the five joint sureties.

U. S. v. Schoverlin, 146 U. S. 76, Anno 1890, the defect of defendants in error, described as a firm, was held amendable, citing Estes v. Trabue, the statute of amendment of 1872, C. 225.

Hardee v. Wilson, 146 U. S. 4, 1892. Appeal by one of several joint defendants from a joint decree, dismissed; suit to set aside two deeds as fraudulent as to creditors. But this is in equity.

Nash. v. Harshman, 149 U. S. 263, 1893, C. J. Fuller, dismissal, because the decree below was not final; which is the point decided in the case cited as the authority. Hohorst v. Hain, A. P. Co., 148 U. S. 383.

Inglehart v. Stanbury, 151 U. S., Anno 1894, was an appeal without the parties having the material interest in the decree, and the appellants had no interest—dismissed.

Davis v. Merc. Tr. Co., 152 U. S. 590, Anno 1894. Brewer, J., two appeals dismissed on the ground that the parties in

interest against the reversal, were not made parties to the appeal, though they had a preponderant interest. In fact, it was impossible to make a full decree without them, the ordinary rule, "that all parties who appear to have any interest in the order or ruling challenged must be given an opportunity to be heard."

Beardsley v. Ark. R. W. Co., 158 U. S. 123, Anno 1895. Appeal by one defendant in decree below without making complainant a defendant to the appeal, but merely making a co-defendant a defendant to his appeal—dismissed.

Sipperly v. Smith, 155 U. S. 86, Anno 1894. Fuller, C. J. Appeal by Sipperly, second creditor, secured by a trust deed; property conveyed by the debtor in fraud of creditors, attached by creditors. To this bill it seems that trust creditors were not made parties, for they came in jointly as intervenors by bill, asking that the deed be held valid—decree that it be held invalid.

Appeal by second secured creditor, and intervenor without first creditor and joint intervenor; and the appeal was not against the makers of the deed—held bad.

Wilson v. Kiesel, 164 U. S. 248, Anno 1896, Fuller, C. J. Wilson appealed, as to three defendants in error out of thirty odd, from a decree "as to all of them on a ground common to all." The case was one of contribution to make up a sum for which they were liable pro rata, and the amount each was to pay depended upon the amount each owed on subscriptions of stock. Of course, no one could be brought up separate from the others, as this would make it impossible to make a complete decree. This was a non-joinder of necessary defendants in error.

It would seem needless to go further with this argument, but the conclusion to be deduced by a discussion of the principles involved seems to be as clear as the preponderance of

authority. First, then we insist that the objection is to matter of form cured by the Statute of Amendments.

Matter of Form.

A writ of error is a suit brought in a court of error. The adverse party objects that a proper plaintiff is not joined. Why should the party in the court of error not have his summons to the necessary co-plaintiff to have him come in and join in the suit, and in case he refuses order the severance just as the court below would in the suit originally brought there? The case below is ended. The judgment there is that the parties go hence without day. The only case pending is the new suit by writ of error. And it would seem to be an inevitable consequence that the court in which the case and the only case is pending, should be the court from which the summons should issue to authorize the severance.

If the writ of error by one stops the execution as to all (why should it? In fact it does not. Ex parte French, 100 U. S. 1. But one objection to non-joinder is that it delays by successive appeals), does it not necessarily result that the process by which it is cut loose must issue from that court by which it is stopped, and be directed to the court below and require them to proceed as to the others?

A *quare executionem non* issues from and is returnable to the court in which the cause is—the court of error. If it issues the writ by which the defendant in error, plaintiff below, can have his writ of execution, why cannot the same court issue the summons to a party who refuses to allow his name to be used? If it can act on one party, why not the other? If it can issue a writ incidental to the jurisdiction in one case, why not in the other? If it can issue a writ *quare executionem non habere*, why not summons and severance?

If the joinder of parties is required because no proper judgment in the cause can be pronounced without them, then their

joinder is matter of substance necessary to the attainment of justice. If they are not necessary to the adjudication of the rights of those before the court, but only to make a conformity of one part of the record to another part of the record, then it becomes matter of form and not of substance.

Further: If a party can be joined without authority and against his will and then be summoned and severed in the court of errors; or, if without joining him he can be summoned and severed in the court below, it results that the difference is matter of form and not of substance.

From this it appears that if two ought to join in error, and one without the authority of the other, or in defiance of his refusal joins him in the writ, then when he fails to come into the court of errors the one plaintiff may apply to the court of errors for his summons and there have judgment of severance. But if plaintiff in error is not willing to use the name of the other wrongfully he cannot have that remedy, but must go back, commit a breach of propriety, unlawfully use the name of another against his will, get a new writ with his name in it and then summon him, and behold he is justified and can have due remedy. In other words, if the court below chances not to be in session the only remedy is to violate the law by a fraud on the court—a lie upon the record—say both complain when one does not, and then in virtue of the praiseworthy fiction he is *rectus in curia*.

Now, is there any substantial reason in *rerum natura* why the truth would not answer as well as the lie? Why, when he won't come the other should not say so to the court and have his summons—as well as for him to say, I have him here but he won't go with me any further, and I want you to cut me loose from him? What is this but form, not substance?

Rather than adopt the natural presumption that a man who doesn't take a bill of exceptions and appeal, doesn't want to, the court sacrifices the right of his co-defendant or plaintiff who

fails to fortify this natural presumption and make it certain to a certain extent in particular, by putting it upon record.

Yet, in the case where it is absolutely necessary to the complete adjudication of the rights involved have the parties before the court, they dispense with it if the form is pursued of calling him into court and putting upon the record, "he says he won't." This shows that it is a matter of form and not of substance. This form is wholly disregarded by Story in Todd v. Daniel, and abandonment and desertion held sufficient 16 Pet. 521; ante p. 11.

Amendments.

The U. S. statutes of amendments enact that "no summons, writ * * * process * * * or other proceedings shall be abated, arrested, quashed, or *reversed*, for any defect or want of form. But the courts shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects or want of form in such writ, * * * return, process, judgment, or course of proceeding.

"And they shall allow all amendments except such as have been pointed out by demurrer, and may at *any time* permit either of the parties to amend any defect of the process or pleadings as the courts respectively shall, in their discretion and by their order, prescribe."

Brightly Dig., Title Amendments.

The word "reversed" clearly applies this remedy to courts of error.

It is held to apply to courts of error in The Edward 1 Wh. 261. It was held in Kennedy v. Georgia Bk., 8 How. 611, case in equity, to allow a vital amendment (jurisdictional), and by *consent* the amendment was made in the Supreme Court. Held to be not jurisdictional. This case cites 1 Gal. C. C. 22. Also Bradstreet v. Thomas, 12 Pet. 64; and this case when referred to, shows the favor shown to mere defects not affecting the merits.

It is held to allow the introduction of new plaintiffs in error by amending the writ of error in the Island S. C. Co. v. Tolson, 136 U. S. 572.

Estes v. Trabue, 128 U. S. 225, was cited in the above case; citizenship not averred cured by admission in demurrer. It was also cited in U. S. v. Schoverlin, in which it was held that an appeal prosecuted in the name of a firm was amendable, and the matter was amended and decision on the merits, per Blatchford, who decided Estes v. Trabue. This was a case on a bond. Joint judgment against principal and two securities. "There is nothing distributive in the judgment" so that it can be considered as separate as against claimants and against sureties.

In the case of Mason v. U. S., 136 U. S. 581, the court held the omission not to be amendable.

In U. S. v. Schoverlin, 146 U. S. 76, Anno 1892, an amendment was allowed by inserting names of defendants in error in a writ against them as a company; partnership.

Owings v. Kincannon, 7 Pet. 399; two out of six parties united in interest under a joint decree dismissed in analogy to rule at law and also on the principle of need to join all parties necessary to one decree final as to all. Marshall, J.

Moore v. Simonds, 100 U.S. 145, appeal in prize case in name of firm amendable.

In Pearson v. Yewdall, 95 U. S. 236, it was held that the city of Philadelphia was the only necessary party defendant and the writ not being against her was bad. The plaintiff in error and defendant were on the same side of the case. Opening a street.

In Knox v. Castello, 3 Burr 1789, *Scire facias quare executionem non* is only a writ to bring the plaintiff in error to assign his errors; he comes in upon it and assigns his errors. Therefore he waived any objection and admitted the one executor to be sufficient to call upon him merely to assign errors.

He might, perhaps, have moved to quash it, but as he did not challenge it he has waived the objection to it; "and we are not to presume the other executor to be alive."

This shows the matter to be waivable or amendable.

In the same case Yates, J., cites Hackett v. Heme, Carthew 7, that "writ of error by one alone, on a judgment against two, is not good. But that is on account of the inconvenience that would arise from perpetual delay of the execution, if every defendant might bring a writ of error by himself. Now that reason does not hold in the present case, where these executors are defendants in error and not plaintiffs."

This is the only reason given in the English cases, we believe.

This shows clearly that it is not the mere correspondence of parties above with the parties below that is the ground of the rule. For if that was material it would not be material as to plaintiffs in error, and immaterial as to defendants. It is to prevent interminable delays of the execution. This was when the limitation of writs of error was twenty years. This delay can be prevented by summons and severance. It can be done by writ of *quare executionem non*—that is, a writ calling on the defendant to show cause why the plaintiff should not have execution against him for some defect in his proceeding—but if the plaintiff in error can have a writ in the court of error to have execution, can he not have the same writ below, for the reason that one party has taken a writ of error? Is it a recognized writ—common law process? The case is not inseparable, for it does not apply to defendants in error. If it was inseparable it would all go up on error by one, and the writ *executionem non* would issue there, or if it was separable one part would remain below and the *executionem non* would issue from the court below. If the co-defendant (plaintiff in error) can have severance, why not let the plaintiff below have *executionem non?* That would be a simple solution of the

whole matter. And this shows that it is a matter of form and not matter of substance.

In the present case no execution is awarded but for costs. The judgment on the main question is merely declaratory of title. Record page 11, 2 lines from foot of page. There is in effect nothing to supersede but the judgment for costs. The plaintiff below is not delayed of anything but his judgment for costs. As to the judgment for costs, it cannot be joint, and does not purport to be in this case. Each, it is true, is liable for the whole costs of the plaintiff below, but the liability for costs is several, and if it all be levied of the property of one, or paid by one, he can have no contribution from the other, any more than he could have if the costs had been incurred and adjudged in two separate suits.

Anderson v. Saylor, 3 Head 552 Tenn.

Rhea v. White, 3 Head 122.

If the joinder of parties is required because no proper judgment in the cause can be pronounced without them, then their joinder becomes matter of substance necessary to the attainment of justice. If they are not necessary to the adjudication of the rights of those before the court, but only to make a conformity of one part of the record with another, then their non-joinder is matter of form, as much as an addition of gentlemen, instead of laborer, and is as much to be disregarded or amended.

See dissent in The Protector, 11 Wall. 82.

Germain v. Mason, 12 Wall. 259, shows that the rule does not require as a mere matter of course, that all parties in a suit shall join in a writ of error to reverse a judgment. That it is not merely technical, but that it regards the substantial right of the plaintiff in error to the reaching of which, the co-defendants are such parties that a complete judgment—a complete determination of the case—can not be made without them.

This suggests a probable solution of the whole rationale of the rule. And it is a rule which runs through the law of procedure everywhere.

When a case is made in which the rights of parties not before the court is so involved, that the rights of the parties brought in, cannot be determined and settled without bringing other parties before the court, and no decree or judgment can satisfactorily be pronounced without them, then the court will peremptorily require the needful parties to be brought in, or else refuse to act. But in this case the courts of the United States have on account of the limitations upon their jurisdiction modified strict rules, and dispensed with parties, of whom personal jurisdiction could not be obtained, if they could administer even partial, incomplete justice. 1 Kent Com. 346 n d.

If the rule relied on in this case is administered in this spirit, and applied to cases in which parties are omitted necessary to a judgment or decree, complete and perfect as to the parties before the court, then it becomes a rule having reason and substance to support it—beyond a mere unsubstantial adherence to form. It will be found upon the review of the authorities that this view is fully sustained.

See Basket v. Hassel, 17 Otto 602, per Matthews.

In Cox v. U. S., 6 Pet. 172, the decision is wholly inconsistent with the idea that the writ of error is the warrant which gives jurisdiction. There a judgment was rendered jointly and severally against the estate of John Dick and Nat. Cox for $20,000 and costs, and judgment against Nat. Dick and James Dick for $10,000 each and costs.

"The judgment debtors severally sued out writs of error and separate citations were issued and served." Motion to dismiss denied.

Now if all the parties here were necessary to give the jurisdiction, one writ could not derive any aid from another suit.

Two suits in the same court cannot aid each other. Each must stand on its own bottom.

Then the decision is, that a joint and several judgment against four parties, may be brought up by writ of error separately, and that the non-joinder is not fatal.

This is the earliest case on the subject of non-joinder in the Supreme Court Reports, and this is all fours with Cro. Car. 408.

Is not the rule founded on the same principle that all parties "materially interested either legally or beneficially in the subject matter of a suit, are to be made parties to it * * * so that there may be a complete decree which shall bind all?

Sto. Eq. Pl., sec. 72.

And does not this mean, as the court say in Gregory v. Stetson, 133 U. S. 587–794, that the court may "be enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits and to make it perfectly certain that no injustice is done, either to parties before it or to others who are interested in the subject matter, by a decree which might be grounded upon a partial view only of the real merits?

1 Dan. Chy. Pl. & Pr. 246.

Jurisdiction.

What are the essentials of jurisdiction?

The true view as to jurisdiction seems to be this:

Premising a court of general jurisdiction, that is, the general right to try causes, there are four essentials to the right to try a particular case:

1st. That the subject matter is within the powers of the court.

2d. That there be a cause of action existing.

3d. That the plaintiff, whether one person or more than one, shall completely represent a complete cause of action.

4th. A party defendant against whom the cause of action exists.

If you have these you have a cause which the court has the right to try—jurisdiction.

If you need any more, we have found no good authority for it.

The jurisdiction of a suit in error depends upon the writ just to the same extent as it does in any other original action.

Blackstone says, Vol. 3, p. 273, the original writ "is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause." Just what Tidd says as to the writ of error.

The strongest possible statement for the holding that the joinder of a party is a matter of jurisdiction would be this:

If parties fail to join in an action on contract, the court does not obtain jurisdiction of the joint, the duplex party, and so cannot proceed with it for want of the proper parties. The whole thing, *i. e.*, whole right to be litigated, is not before the court. The right of action here is regarded as an indivisible unit. That unit must be represented. If the interest in, *i. e.*, the right to that indivisible unit, resides in several distinct persons, each vested with an interest in all and every part, the unit is not before the court unless all of the persons are. So in contract if you are bound to two persons, they must join to sue for it; otherwise the thing, the unit, the cause of action, is not before the court, and the court has not the jurisdiction of the case. But this could only be sound if that unit was in the last analysis inseverable; but even in contract it is severable by summons and severance.

Passing this, however, as correct as to contracts, if the right to sue for a trespass is a wrong to two, it would be subject to the same rule. But the whole theory of the common law is against the idea that a wrong to one person can be a wrong to another. If, as said above, A with one sweep of his staff strikes B and C, the injury which B receives does not enter

into the damages that C has sustained, and is no part of his right of action, and *vice versa*.

So if A and B are tenants in common of a tract of land, they each sustain a several injury by a trespass upon it. If A sues for the injury that accrues to him by a trespass to the land, the unit which the right of action is, is complete in him, and he may maintain the action. His injury is not B's injury, though it is an injury to the same tract of land.

Now, when we come to the writ of error, the question is the same. The injury complained of is the error of the court as it affects the plaintiff in error. The right of action is a unit. Now, is it a right in which another has an undivided interest, and which is not completely represented by either one, or by both separately? If the error which is a wrong to A does not affect B or is right as to him, it is plain that the unit, the right to legal redress for that error, is in A, and not at all in B. But suppose the same charge affects them both in *totidem verbis*, what then? Let us take the proposition to pieces. "Gentlemen of the jury, the court charges you that A and B set up a defensive title; they have no such title." That looks like a joint wrong, but is it? "They" consists of two parts, A and B. Suppose we put it: The court charges that A's defense is naught; B has no right to except to that; he is not hit or hurt by it. It also charges that B has no defense; now this is no injury to A, and he cannot except to it. The charge, joint in form, operates just as severally and respectively as the several charges; in fact, being resolvable into parts, it is in law a several charge, and joint only in form. Now, to so much of it as injures A, B has no right to except, and *vice versa*. It is merely the same stick which hit both, but the hurt is not the same, and the unit, cause of action in error, is not the same in A that it is in B. If they join in error the defendant cannot object, for he has yoked them together. But it is the case of the four outlawed in one judg-

ment; they have their election, but if two free themselves of the yoke, that end drags and they must all go out together.

The question of jurisdiction then is simply this: Is there a complete cause of action here completely represented by a party who alone, without aid from any other, fully represents it? If so, the jurisdiction is complete.

And this admits of one result, and one only. There is in this judgment an injury to Ayres, which affects no one but Ayres, which is therefore a complete cause of action in him, which needs no other to represent it, and therefore the jurisdiction is complete.

No sooner had the early jurists practically worked upon this idea than they discovered that there were circumstances where one necessary part of that representation might act to the prejudice of the person who desired judicial redress, and they at once made an exception to cover such exceptional cases. Summons and severance—a summons of course, with a judgment of course, involving no actual judicial action or discretion whatever—by which there was put upon the record that which might just as well have been presumed.

But it may be and has been said that by refusing to join, the non-joining plaintiff precluded himself from future action. What right would the court have to cut him off from any portion of the time that the statute allowed him in which to prosecute his writ of error? But suppose the plaintiff in error waited until the last moment of the last day for his co-plaintiff to come in and join him. Would he not have evidence equivalent to his actual refusal, even more conclusive in the fact that his non-action was beyond possible doubt irrevocable? Now would this enable the active plaintiff to proceed without the other? No possible delay by any later appeal. No possible second hearing. What does it lack? The record shows it all. Nothing is wanting. We have authority that if there is joint judgment vs. two executors one

may proceed and the court will not presume the other to be alive. If extinguishment of right by death will cure, why not extinguishment by the statute of limitation? But in the case at bar Price was cut off the moment the court adjourned, having failed to take a bill of exceptions.

There are cases which declare this matter jurisdictional. A judgment of this court with the record showing this want of jurisdiction, would on that hypothesis, be void. Think of that.

Jurisdiction in error in England is said to depend on the writ of error, which is a writ issuing out of chancery authorizing the court of errors to proceed in *each separate case*, in the nature of a commission, under which only their authority to proceed arises. 2 Tidd 1134. Just as every original writ is the warrant of the court to try the case. 3. Bl. Com. 273.

Jurisdiction of the Supreme Court of the United States of writs of error, is vested in it by statute and does not depend upon the writ, though it issues in the name of the President of the United States. It only purports to direct the inferior court to send up the record to the court of errors, and does not purport to confer any authority on the court of errors.

A writ of error is neither in form nor substance a commission any more than a summons in debt or other cause of action is a commission to the court, though in England both were alike so regarded, both being by original writ.

Even in England the premise is mere fiction entitled to scant respect, and the deduction from it is at least questionable. The courts there have an established jurisdiction of classes of cases, and do not derive their right to try a class of cases from the commission (which the writ of error is asserted to be), but from the law. If the so-called commission issues in a case in which error does not lie, it would confer no authority and the court would disregard it. It is therefore not the source of jurisdiction over the case (which source is the common law),

but the process by which the parties are brought in and jurisdiction of the person is established.

But in the United States this is beyond question the case, and as the writ is neither in form nor substance a commission in each particular case, but merely a direction to the courts below to certify the proceedings, the jurisdiction of the case does not depend upon the writ. Only the jurisdiction of the person depends upon the writ, i. e., only the jurisdiction of the person is obtained by means of the writ; jurisdiction of the subject matter is conferred by the statute.

So the analogy between the cases as held in England and the case here, is a false analogy, and the court can see at once that the idea of the writ conferring jurisdiction of the case, as distinguished from personal jurisdiction of the parties, is manifestly erroneous.

If this view of the jurisdiction is correct, the court can waive its right to protection against a double hearing, when it is fully protected. The defendant can waive it by delay, or the court can refuse to insist upon it when it is cured.

Now, in an original suit, if a plaintiff joins one who has a *joint* interest, and the jointly interested party refuses to allow his name to be used, he may have summons and judgment of severance and be allowed to proceed alone.

The defect is therefore not a defect of jurisdiction to try the case, simply a want of power to bind the omitted party—not the party suing, but of the party failing to sue.

That it can proceed with the other party alone before it, proves that jurisdiction is complete with one party absent. But the jurisdiction of the person absent is not essential to the right of the court to proceed, but merely a matter of practice, like the rule that a party shall not split up a cause of action.

When one party having a right has a case, even though another has an interest with him, the court will not proceed

without the other. Does the court obtain the jurisdiction of the case by the refusal of the co-complainant to join? or by the statute conferring the power to try cases. When it dispenses with the presence of the co-plaintiff by saying you may sever, is the jurisdiction obtained by virtue of the authority which the act of the outgoing party confers, or does it merely relieve the jurisdiction it already had obtained of having to try the same matter twice? What new virtue, authority, warrant, control, is infused into the court by the act of the outgoing party? The rule is merely a rule of practice to protect the court from a double hearing—which concerns only the court and the parties before the court.

The jurisdiction of the person to be cut off and barred is obtained by the summons, and the want of the party is cured by the severance. Now if it is cured by the separation of the interests, or if the judgment of severance extinguishes the right, what more or other thing does it do than what the statute of limitations has done in this case? If the severance only severs and does not extinguish the right of the second plaintiff, then the statute bar does more—but the greater includes the less—if separation is enough, extinguishment is more than enough; but surplusage or supererogation cannot prejudice. In other words, how can a thing joint with two parts, remain joint when one part is extinguished? A joint right of action is severable by judgment; it no longer remains joint. How can it be joint when one part no longer exists?

The English cases make this distinction clear. Where one executor refused to join and was not joined in a suit, the court said they had no right to presume that he was alive, and held the suit well brought. In that case the right of one executor, if dead, survived to the other.

But when a joint right survives to the administrator or heir of the deceased, the death does not extinguish, or sever the

interest, or dispense with the need of joining the party who has the joint interest.

Here the interest which Price had in the controversy, if it had been joint, has been extinguished by the statute, not transferred.

Now, if the statute had provided an extension of time in any case, and that case had occurred, the right being saved to the heir (or other), of course that would be different, the the right not being extinguished but transferred, the severance would not take place.

A non-joinder of proper parties, in an original suit, must be taken advantage of by plea in abatement; because it is disfavored in law, it must be made before appearance and at the return term. The motion to dismiss was not made at the first term, and by analogy it ought to be barred. And this is especially so, as the injury by a dismissal then would have been harmless. We could have brought a new writ of error. But before the term at which this motion is made, the new writ is barred, and the injury beyond remedy. With an unquestionable right to a reversal, we are cut off without a decision on the errors in the record.

Every action of a court is supposed to have a purpose tending in some way to benefit the party who makes the motion, and to which he is entitled at the time he asks for it. If the time when it can operate to right a wrong to him has passed, he has lost his right to use it.

See Bradstreet v. Thomas, 12 Pet. 64.

Failure to proceed promptly waives objection. Tidd's Pr., p. 1162. Error taken before costs taxed and so premature, held cured by rule to assign errors. The defendant ought to have appeared to quash before. Citing 5 Barn. & Cres. 735, 1 Man. & Ryl. 170, 7 Barn. & Cres. 404, S. C.

Tidd's Pr. p. 1136. Where writ of error was against two executors, and only one appeared, and judgment affirmed for

both, second writ for this error, and held cured by the failure to object at proper time, and the court would not presume the other executor to be alive. 2 Str. 783.

The non-joinder of a person who ought to be made a plaintiff, in an action of tort, must be pleaded in abatement, though as to actions on contracts it is otherwise. 3 Ch. Pl. 452.

Observe that here is suggested a point that it is desirable to make prominent, and which the court is asked to keep in mind during examination of the decided cases. That the distinction between tort and contract as to parties is radical. The court is asked to observe that in no case founded on tort alone has the non-joinder been held fatal in the Supreme Court of the United States, so far as the reports disclose the nature of the action, except in the case of Hampton v. Rouse, and that case is put expressly on the ground of joint judgment and joint bill of exceptions, and no adverse or even several interest appears or is suggested.

Does the jurisdiction of the court, the right to try the case, depend upon the facts, or the time and manner in which the facts are brought before the court? If on the facts, it is matter of substance. If on the manner and time, it is form.

Here the fact exists that Price did not want to appeal—or could not. If that had appeared by summons and entry of record, it would have shown the fact at a particular time and in a special form. When this motion is made it appears in a form equally conclusive, that he has not applied within the time prescribed by law—the same fact in a different form. But in one case you are supposed to have jurisdiction, in the other, not.

The purpose is to prevent interminable delays and double hearings; both are prevented, but not in the special form or time.

Summary.

In conclusion, we claim now to have shown:

1. That though we might have joined Price with Ayres, that we were not bound to. Hanrick v. Patrick.

2. That it was not good practice to have done so. Paddock case.

3. That the court has jurisdiction when it has before it a complete cause of action, represented by a party who completely represents it. And that Ayres completely represents a cause of action entirely different from any cause arising from any exception that Price could have taken.

4. That as Ayres and Price could not declare jointly on adverse claims in an original action for an injury to the property, they cannot join in inconsistent assignments of error affecting the adverse and several titles.

5. That no reported case in the Supreme Court of the United States or in the circuit courts of appeal has held that parties situated as Price and Ayres are, ought to be joined in error.

6. That many cases have held that parties having a much closer connection need not join.

7. That mere identity of the thing in litigation is not enough to require the joinder of all the parties having claim to it.

8. That a party claiming the protection of a rule adopted to prevent a particular injury ought to claim that protection while it will protect; especially, when delay works irreparable injury.

9. That the only inconvenience suggested in the common law cases, is, delay of the plaintiff below of his execution by successive writs of error *during a limitation of twenty years.*

10. That in thirty-two cases reported in the Supreme Court, not one requires the joinder of parties in a case like this.

11. That in eleven cases out of this thirty-two, it is held that parties in much more intimate relation to each other than Price and Ayres, could have separate appeals or writs of error; and that the same may be said in seven to eleven of the eighteen cases from the circuit courts of appeal.

12. That in the only case reported from the United States Supreme Court in an action in its nature *ex delicto*, directly bearing upon this case, it was held as in Paddock's case, 6 Rep. 25, that the non-joinder was not cause of dismissal. Hanrick v. Patrick. Ante 11.

It results that the judgment of the Court of Appeals is erroneous and must be reversed. It remains to show the errors in the judgment of the circuit court, to which end we present

A BRIEF ON THE MERITS.

The assignments of error are set out in the Record at pp. 266 to 272, both inclusive.

The errors especially discussed and relied on for a reversal in this brief are these:

1

The court erred in giving a peremptory instruction for plaintiff below in these words: "The motion of the plaintiff to direct a verdict in his favor is granted."

Brief pp. 51 to 83.

2

The court erred in excluding from the jury testimony which tended to show that the concentric rings in trees, mentioned in the record, proved their age with accuracy.

Brief pp. 83–85.

3

The court erred in excluding testimony offered by plaintiff in error, which he claimed showed an estoppel on the defendants in error to set up title to the land here in controversy.

Brief pp. 85–89.

4

The court erred in not holding that the plaintiff in error made out a fee simple title to the land here in controversy.

Brief pp. 89–91.

5

The court erred in excluding from the jury the plat and survey offered by the plaintiff in error.

Brief p. 92.

6

The court erred in excluding from the jury the record of the circuit court of Mississippi county, Arkansas.

Brief pp. 92–93.

7

The court erred in excluding from the jury the deed from the Commissioner to John A. Lovewell, grantor of plaintiff in error. Brief p. 93.

8

The Court of Appeals erred in dismissing the case, and in failing to reverse for the reasons above assigned.

Plaintiff in error (called defendant hereafter in this brief), E. M. Ayres, alone, brought error to the Court of Appeals.

The defendants in error (called in this brief hereafter plaintiffs) claim rests solely upon this theory: That the land here in controversy is accretion to 5000 acres Polsdorfer bought from one Marley, and to 400 which he bought from Williams. p. 68.

These purchases lie in Lauderdale county, Tennessee, as shown by deeds to Polsdorfer, of date July 12, 1892. pp. 30–35.

To establish the right of Ayres to a reversal of the circuit court judgment, it is only requisite to show that there was evidence that ought to have been left to the jury to prove that the land in controversy was not accretion to Polsdorfer's land. This we prove by a weight of testimony that would have entitled us to a new trial if the jury on a proper charge had found against us.

In addition to this, we affirmatively prove that Flour Island existed from 1823, when it was surveyed as part of the territory of the United States; that it was granted by the United States; that it originally lay west of the main channel of the Mississippi, part of Arkansas; that the river suddenly shifted about 1839 or 1840 from the east, the Tennessee side, to the west, the Arkansas side, of the island, and that the whole body of the land is accretion to that island.

The deraignment of plaintiffs' title to the 5000 acres is from the State of Tennessee. pp. 13–32. The Williams' 400 acres is not deraigned from the State at all.

This, then, is the only claim of plaintiff for a recovery, that he owned two tracts of land in Lauderdale county, Tennessee, bordering on the Mississippi River—one of 5000 acres (the Woodfolk tract)—and the other of 400 acres (the Williams tract) and that the land here in controversy, from 3000 to 5000 acres (p. 67, 142, 184), is accretion to these two tracts of land—accretions to the Tennessee mainland.

The defenses in the case are fourfold—

1. The lands here in controversy are a part of, and accretions to, Flour Island*; being fractional sections 17, 18, 19 and 20, of township 12, range 12, east of the fifth meridian, which was surveyed and sectioned by the United States in 1823 as a part of the territory of Arkansas, consisting at that time of 256 acres, and that from that day to this the land here in controversy has constituted a part of the territory of Arkansas and of the State of Arkansas, and is not accretion to the Tennessee shore.

2. If Flour Island was entirely washed away, and was reformed as Tennessee soil—that is, as a Tennessee island—it, with all its accretions, belongs, not to the plaintiff, but to the State of Tennessee.

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* Flour Island, spelled also Flower Island in the record, was so called because two barges of flour sunk there years ago. p. 77.

3. The plaintiffs are estopped to set up title to the land here in controversy. The court erred in excluding the evidence of their estoppel.

4. Defendant E. M. Ayres shows a good title to the land in controversy.

I.

The first of these propositions—that is, that Flour Island—the land here in controversy—belongs to, and is a part of, the State of Arkansas, and is not accretion to the Tennessee shore—is thoroughly established by the proof in this cause. And this record does not furnish a scintilla of proof that there is any accretion whatever to the Woodfolk 5000 acre grant, under which Polsdorfer claims, nor to the Williams 400 acre tract; except the narrow strip between the Tennessee mainland and the center line of Old River as it is now, which Ayres has never claimed or touched.

The whole proof shows clearly that the old Tennessee main shore called for in the Woodfolk grant is clean cut—a sheer and perpendicular bank—from eight to fifteen feet high, against which the current of the Mississippi River has always washed, while its channel was there, and in high water since then, leaving a body of water just at its base all the way along its front, where it now constitutes Old River and lakes and bayous. And the fact that the land in controversy is accretion to that original 256 acres surveyed and sectioned when the territory of Arkansas was surveyed and sectioned in 1823, and that it has had a continuous existence as originally existing or as enlarged by accretion, is as thoroughly demonstrated in this record as any fact *in pais* can possibly be.

We come now to the proof in this record on this proposition, premising that much of the testimony requires to be read with the fact in view, that the witnesses seem to have somehow had in mind the idea that the controversy turned upon the question whether there remained any part of the original

256 acres; and they speak of the whole island being washed away in the same breath and at the same time that they are fishing on its banks or hunting ducks with their feet upon it. Keeping this in view, there is hardly any discrepancy in the testimony.

1. Charles Bowen, 85 years of age, page 191, has lived in Mississippi county, Arkansas, for seventy years, and has known Flour Island before Arkansas was admitted into the Union. In fact ever since 1832. That after Arkansas was admitted into the Union in 1839 or 1840 the channel of the Mississippi river, which before that time was on the east or Tennessee side of Flour Island, changed to the west or Arkansas side of Flour Island. p. 191. That when he first knew this island it was surveyed by the General Government, and sectioned as Arkansas land, and attached to Mississippi county, Arkansas, as fractional sections 17, 18, 19 and 20, township 12 N. R. 12 east of the 5th principal meridian. That his brother was sheriff and tax collector of Mississippi county, Arkansas, from 1837 to 1845. That the witness was sheriff and collector for sixteen years, beginning about 1845. And that he was a deputy under his brother for five years preceding his election. That he assessed and collected taxes on Flour Island, sections 17, 18, 19 and 20; he does not know exactly, but it was along in 1844–5 and 6; that he remembered the name of Barnes, but the other fellow who paid the taxes to him on this land, he doesn't recollect. That the last time he saw the island was in 1861. That at that time there were four or five hundred acres on the island, high and heavily timbered land, and that at that time in the old channel of the Mississippi River, lying between Flour Island and the Tennessee shore, there was water nearly all the way round the island. p. 192. That in 1861 he was a Confederate soldier at Fort Pillow, and that he crossed over from Fort Pillow to the island on an old boat, which was used as a bridge to

the drill ground situated on the island. That in 1832 there were two islands in existence, one known as Island 32 and the other as Island 33, which latter is Flour Island. That the channel changed in 1839 or 1840, it struck the head of Island 32 harder than it did 33, and threw the channel through the chute between the two islands, sweeping away 32 which was west of 33, and leaving the channel on the west side of 33. p. 193. And that the taxes he collected from Barnes were taxes on Barnes' land on 33, which is the island in the present controversy. p. 194.

As further evidence that the land in controversy, fractional secs. 17, 18, 19 and 20, belong to the State of Arkansas, the defendant introduced and read from a book from the office of the clerk of Mississippi county, Arkansas, showing that fractional sections 17 and 18 were entered by D. Hardiman in the year 1836; and that fractional sections 19 and 20 were entered by J. C. Barnes in 1846. A plat book of Mississippi county, Arkansas, was also introduced which showed the relative position of Craighead Point, which is in Arkansas, and Flour Island. p. 232.

The patent from the United States Government to D. Hardiman, on the 1st day of February, 1843, shows the land here in controversy, or "fractional sections 17 and 18 (on island) in township 12 range 12 east, in the district of land subject to sale at Helena, Arkansas, containing 158 acres and one hundredth of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, which said tract had been purchased by the said D. Hardiman," certified from the Interior Department at Washington, and shows that it is Arkansas land. p. 230. And "fractional sections 19 and 20 (on island) * * * containing 99 acres and seventy-hundredths of an acre * * * purchased by John C. Barnes," shows that that was a part of Arkansas when he purchased. p. 231–232.

The map and survey from the United States land office show the position of that island, where these fractional sections 17, 18, 19 and 20, lay at the time of these transactions (p. 232); all showing that at that time, and from 1823 up to that time, Flour Island was recognized as belonging to Arkansas, and was so treated by the United States Government, by Arkansas, and by all persons.

2. E. C. Cooper, 66 years old, resides in Lauderdale county, Tennessee, and has known Flour Island since 1854. From 1854 to 1862 there were 1000 acres of the original island, and a good big farm on it. p. 182. The timber on it at that time varied from twenty inches to three feet in diameter. The land on the island sloped toward the Tennessee shore, it being much higher on the southwest side—the Arkansas side—than on the northeast side—the Tennessee side. The timber was much smaller when you got off the main body of the island. There were some fifty or sixty acres of cleared land in 1862. p. 183. That on the 25th of December, 1898, there were "three or four acres of that original island" across the top of the backbone. This backbone of the original island is right at the foot of Crutcher Lake. From 1854 to 1862 there were pools of water and lakes between the island and the Tennessee shore at the banks of the Tennessee side. The deep water was at the Tennessee bank. And some of these pools and lakes hold water the whole year. In 1854 Old River ran along the original Tennessee shore, and it was then 400 yards wide, and extended around and up to the Friend place. It was three-fourths of a mile wide in some places and a mile wide in other places. p. 251. The Tennessee banks are generally perpendicular now. Witness would guess there were 4000 or 5000 acres of the island now. p. 184. "To the island, as I knew it in 1854, there have been large accretions." Witness, pointing to the backbone, said the land made in every direction from this backbone, all around it. And it formed from

the island toward the Tennessee shore. There "was no formation out toward the island from the Tennessee shore. Oh, no, there is none to this day." The backbone is higher than the other part of the island, and as he saw it in 1898 it existed in 1854. p. 185. It is about four miles from the head of Flour Island, going down the old channel of the Mississippi, to where it empties into the main river. In the old channel it is mostly willows. At the upper end mostly mulberry and box elder. The willow growth, from the size of a riding switch up to fifteen inches in diameter, extends from the mouth of Old River three or four miles and next to the Tennessee shore—between the Tennessee shore and Flour Island. At the extreme upper end there are cottonwood trees, I suppose, two feet in diameter, and from that on down. p. 186. In 1854 witness had a contract with Barnes to cut cordwood on the island. The wood was mostly cottonwood, which was about three feet in diameter. Going from the Polsdorfer house (this is really the Fortner house, built by defendant Ayres, 1892, p. 215–216) toward the mainland, on the Tennessee shore, the land seems to be about the same height until you get within about 600 or 700 yards of the Tennessee shore, when it slopes and makes a depression along at the Tennessee shore, where there are pools and ponds of water. p. 187. Witness was on the island in 1867, and the backbone was considerably higher than any of the other land around it, because there was an overflow at the time, and this was the only land out of the water. p. 188.

3. William Hip, 71 years old. Lived on Flour Island from 1856 to 1862.* There were 150 acres of old timber land and from forty to fifty acres of cleared land, five houses, one double and four single houses, on the island in 1856. The cleared land, should say, had been cleared thirty-five or forty years.

* The statement of this witness that he left the island in 1862 (p. 233) is an evident mistake, as witness Laurence stayed in the Hip house in 1864, and the witness Driver stayed all night with William Hip in the latter part of 1864 or early part of 1865. p. 196.

Including the 150 acres above spoken of, there were 1900 acres of Flour Island in 1856. The accretion was to the island and not to the Tennessee shore. Water stood in places between the Tennessee shore and the island; and the Tennessee shore stood above the Old River bed in some places from four to six feet, and in others from ten to twelve. There was a slant in the lay of land from the old island in the direction of the Tennessee shore. There were stumps on the cleared land from three to three and a half feet in diameter. pp. 233–4–5. The timber on the accretion, or newly formed land, was smaller than the timber on the old original Flour Island. The largest on the accreted land being about two feet in diameter, from that to little timber; getting smaller as you went from the original Flour Island toward the Tennessee shore. At or near the banks of the Tennessee shore, opposite Flour Island, the willow brush was so thick you could hardly pull through it with a skiff. In other places there are ponds and no growth. A part of the original island, as it existed in 1856, was there four years ago. There was a very notable place to me, where we swam cattle off, in 1858, out to the bluff (on the main shore). It was a high place in the island, with large timber on it, and was the place from which we shipped our cattle during high water. Witness doesn't think there was more than half an acre of it when he saw it three or four years ago. p. 236.

4. J. E. Fields, a witness for the *plaintiff*, went on the island in 1847—stayed 1848 and 1849. Kept a woodyard there. p. 86. In 1849 witness estimates there were 1000 acres of the island still there. A man by the name of J. C. Barnes owned it then. At that time the Old River ran all around the island between it and the Tennessee shore, and it was a mile across the water from the island to the Tennessee shore in 1849. pp. 86–87.

5. David H. Laurence has known Flour Island since 1864. At that time lived just across the island on Arkansas shore, on Craighead Point. Worked for a man by the name of Gardner, putting wood on the bank of the river, staying a portion of the time at the Hip house, which, from its appearance at that time, was from fifteen to twenty years old. p. 156. The timber cut in 1864 measured from eighteen to twenty inches in diameter. At that time Flour Island was a big place. The last time I was there it was caving on the Mississippi bank. Now that part of the river forms Crutcher Lake; and on the bank of Crutcher Lake is the backbone. p. 157. The timber gets smaller from the Hip house toward the Tennessee shore. And the land also gets lower near the Tennessee shore. In 1894 defendant Ayres took me with him to cut a tree on the island, which we cut, a half or three quarters of a mile toward the Tennessee shore from the backbone. We counted the rings on that tree and there were over fifty rings, I think fifty-five. p. 158.

6. Alexander Baker, examined by both parties, says that the island where Uriah Hip* lived in 1854 washed away. But he says that the made land was made to the island he supposes (p. 87), and he says that there was a backbone which never did wash away (p. 90); and that he has known it since 1854. There was a right smart farm on the island in 1854, and it was said that a man by the name of Barnes used to own it. There was a small farm on it in 1863–4. p. 93. The land slopes when you come near to the Old River, and in the Old River there is nothing but willows, and the timber runs smaller as you approach Old River. The backbone ridge is right at the foot of Crutcher Lake. p. 94–5. This backbone was there

*The Hip house and Hip place referred to by this witness was three miles below Crutcher Lake and the backbone as you go toward Fort Pillow, and was situated on the Mississippi River side of the island (p. 94), and is quite different from the Hip house that the last witness (Laurence) lived in, in 1864, and the witness Driver stayed all night with William Hip in, in 1864 or 1865.

in 1863. Witness was a magistrate in Lauderdale county, Tennessee, along about 1872, and has resided in that county for 62 years. Along in 1872 to 1875 he assessed the Joe Marley or Woodfolk 5000 acres, but never did assess Flour Island. Witness recollects one case in 1854 where a man ran from the officer, and the officer did not get him, saying that he had fled to Flour Island, and that was in Arkansas, and that was the reason why he did not go for him. p. 98.

7. Jacob Cox, aged 68, residence Osceola, Ark., business, steamboat pilot. Has known Flour Island since 1840. p. 200. At that time the channel of the Mississippi River ran to the right (west of Flower Island). He understood it had changed a short time before.

The original Flower Island did not all wash away. There were about 300 acres of it never were moved or washed. To this land there was accreted on all sides new land. p. 201.

8. T. A. Matthews, residence Osceola, Arkansas, and is a deputy clerk of Mississippi county, Arkansas. p. 201. Is acquainted with Flour Island, the same is claimed as a part of Mississippi county, Arkansas; "it is described on the records of said county by survey numbers as all of section 17, all of section 18, all of section 19, and all of section 20, in township 12 north and range 12 east." And witness files as a part of his deposition a plat of the township. He further swears that taxes are paid on Flour Island as a part of Mississippi county, Arkansas. p. 202.

9. W. B. Fortner lives in Mississippi county, Arkansas, and has known Flour Island for fifteen years; lived on it for eighteen months. p. 206. When he moved on the island some four years ago (deposition taken in 1895 in another cause) there were two houses on the part of the island he moved to, and ten acres of cleared land. The houses belonged to E. M. Ayres. At that time there were about 3000 acres of the island. Witness cut cottonwood on the old part of the

island four and a half feet in diameter, sycamores from two to three feet in diameter, and mulberry from eighteen to twenty inches in diameter. p. 207. From Coal Creek up Tennessee bank for a mile up Old River opposite this land was from three to five feet higher than the old channel of the Mississippi River. Then set in a solid lake of water running up the bank one-quarter of a mile next to the Tennessee shore, the water being from five to ten feet deep, according to the season of the year. From the upper end of this lake a bayou sets in, and the banks along the Tennessee shore are from three to ten feet high. Witness cultivated the land, and in so doing plowed up old brickbats, old iron and old shovel plows. This was the same spot that he was informed by old citizens was formerly occupied by old man Hip. The newly made or accretion lands formed on the island, and went out toward the Tennessee shore, and did not form on the Tennessee shore and out toward the island; as the Tennessee banks were bluff, ranging from three feet in the lowest to forty or fifty feet in the highest place above the bed of the old channel of the Mississippi River. And the old channel of the Mississippi River is today plainly marked. p. 208.

10. E. M. Ayres, defendant; lives in Osceola, Arkansas. Bought Flour Island from J. A. Lovewell and paid for it. p. 211. About Crutcher Lake the timber measures eight, nine, ten and thirteen feet in circumference. Right at the head of the backbone, which is on the Tennessee side of Crutcher Lake, last Sunday I made measurement of the timber above spoken of. Last June, Judge Heiskell and myself and a negro by the name of Bell measured a tree standing on this backbone on the bank of Crutcher Lake, and it measured sixteen feet nine inches in circumference. p. 216. Water lies in Old River against the Tennessee bank in front of the 5000 acre tract in pools all the year round—either a continuous river or pools of water. p. 218. In 1894, about three quarters of a

mile from the Fortner house (which house I had built in 1891 or 1892 (p. 214), I cut a tree on the island which measured 42 inches in diameter and had 56 rings; in other words the tree was 56 years old. This tree was not as large as the one measured by Judge Heiskell and myself. p. 219.

11. James D. Driver, aged 69, resident of Osceola, Arkansas; has known Flour Island since 1859. When he first became acquainted with it there was a double frame house on it, and some other small buildings, three or four acres seemingly higher than the rest of the island, forty acres of cleared land, owned as he understood by old man Hip, who was also the owner of the witness William Hipp, with whom this witness stayed all night on the island in the latter part of 1864, or in the early part of 1865, and there seemed to be the same amount of cleared land on the island as when he knew it in 1859. pp. 195, 196. There were large accretions to the island in 1865, and the newly made land was attached to the original island, the timber growing smaller from the island toward the Tennessee shore, and the banks at the Tennessee shore being from six to ten feet higher than the old bed of the river, in some places being nearly perpendicular, and none of the new formed land being on a level with the Tennessee bank. p. 197. Part of the accretions had in 1865 extended to the Tennessee shore; and near the Tennessee shore in places there were ponds of water between it and the Tennessee shore, and no timber there, as it was mostly water. p. 198.

Here then are eleven living witnesses who swear that Flour Island, some part of it as it existed in 1823, still remains, and that the present island—the land here in controversy, is this original Flour Island and accretions thereto. Not only do the living witnesses swear to this, but the physical facts show the same thing. The lay of the land on the island, sloping toward the Tennessee shore from the backbone, the bluff banks at the original Tennessee shore, the Old River lying up against the

original Tennessee shore, the size of the timber, beginning with willow brush at Old River at the Tennessee shore and getting larger toward what the witnesses call the backbone of the island, where a tree is found sixteen feet nine inches in diameter, demonstrate beyond a peradventure that Flour Island as it now exists, is the old 1823 Flour Island with the accretions to the island, and alone to the island.

Eleven living witnesses speak *et res ipsa loquitur;* in fact *res ipsæ loquantur.*

Upon these facts, shown clearly in this record, the trial judge granted the plaintiff's motion, and gave a peremptory charge in his favor (p. 255), asserting thereby that all this was no evidence to be left to the jury. We assign this as error. p. 266.

II.

But in the second place we insist that if Flour Island was entirely washed away, which is the contention of the plaintiff, and if it was reformed as a part of the State of Tennessee—that is, on the Tennessee side of the Mississippi river—it, with its accretions, belongs, not to the plaintiff, but to the State of Tennessee.

The principal witness for the plaintiff as to the material question of fact in this case is Captain Marsh Miller, and we submit that his testimony is conclusive that the plaintiff has no title to the land here in controversy. On page 72, in answer to the second question on that page, he says: "In 1839, 1840–1–2–3–4, in my opinion, the big rise of 1844 changed the river from the Tennessee side of Flour Island, and it went up and above the head of Island 33 (Flour Island), and went down into the chute of Coal Creek, and made a little bit of narrow concern, and changed from the Tennessee shore to the Arkansas side, and went down that way, and continued that way in 1846."

In the next answer, which is hardly intelligible in itself, he says: "The river went down between these two towheads and between Craighead (Point), and lying between Flour Island, and went down that way, and the channel went down next to the head of that and washed that way, and continued washing until 1850, and was all washed away then." He says further: "The channel was on the Tennessee side of Flour Island in 1839." pp. 72–73.

To make this intelligible it is necessary to state that Craighead Point is on the Arkansas side of the river; and the statement is clear to this extent, that the river, which in 1839 was on the Tennessee side of Flour Island, after the big rise of 1844, was on the Arkansas side of Flour Island, and between Craighead Point and Flour Island, and that the island was all washed away by 1850.

This thoroughly establishes the fact that the channel—the boating channel of the Mississippi river—changed in one season from the northeast or Tennessee side of Flour Island to the southwest or Arkansas side of the island.

In 1839 the island was unquestionably a part of Arkansas. The change of the channel left it Arkansas land. On the point of the change of the channel, the testimony of the steamboat captain on a matter of which it was his business to be informed, is entitled to much weight. According to his testimony the island in 1839 was intact, but he says by 1850 it was washed away. On this point his testimony is not to have any factitious weight. When the river left the island a half mile to the left, it no longer concerned the navigation of a boat, and was no longer a professional question. With other witnesses it was a professional, official or proprietary question, and that testimony is entitled to the highest credit.

Captain Miller must mean that the original island—the land on the spot that constituted the island in 1839, as distinguished from its increment by alluvial deposit—was all washed

away. And while we think this record demonstrates that he is mistaken in this, yet in fact if he is not, in that view it would be immaterial. If he means that the island and all its accretions were swept away, so that no part of either was left in 1850 between the Arkansas shore at Craighead Point and the Tennessee mainland, where the high bank defines the boundary of the plaintiff's grant at its date in 1837 (p. 14), then the proof on the other side is overwhelming that the fact is otherwise. For, as we have already shown, the trees on the island absolutely negative its having been all washed away within the last sixty years. Taxes were being collected on the island from 1836 up to 1860. There was a large farm on the island in 1854—four years after Miller says it all disappeared—with stumps on the farm three and a half feet in diameter, and large timber besides. J. C. Barnes obtained a U. S. patent for the land in fractional sections 19 and 20 on the island in 1847 (printed in Rec. 1857), he having entered it in 1846 (p. 232); and D. Hardiman, on February 1, 1843, obtained a patent from the United States "to fractional sections 17 and 18 on the island" (p. 230), he having entered it in 1836 (p. 232).

Another steamboat captain, Drouillard (p. 120) knew Flour Island in 1842 or 1843, and thinks it disappeared in 1843 or 1844. "The channel caving from east to west, cut it away and caved it away." And this at the very time when Hardiman entered his part of it, and he and Barnes went along paying taxes on it to the State of Arkansas.

One other witness, and only one other, John P. Laney (p. 119), said he had known the island fifty years ago, and that it began to wash away a short time previous to 1860, and finally disappeared in 1863 or 1864. And that he knows the facts by hunting and chopping wood on the island. p. 119. At this very time—1863–4—Laurence was on the island haul-

ing wood for Gardner, Driver was staying all night with Hip in 1864 or 1865, on the island, and in 1862 Cooper and Hip say that there were a thousand acres or more of the island, and a considerable amount of cleared land on it.

So that this theory of the disappearance of the island is so effectively exploded that it cannot be entertained for one moment.

But we insist that if it did disappear, it reappeared and whether it reappeared on the Arkansas side or the Tennessee side of the Mississippi River, and even if after the reappearance the accretions extended it to the Tennessee shore, in the one case it would belong to the State of Arkansas, and in the other to the State of Tennessee. Certainly in neither could it by any possibility belong to the Tennessee shore owner by virtue of his riparian proprietorship.

Yet the trial court held that there was no evidence and no legitimate deduction from any evidence upon this record, as stated to your Honors, against the view that this land was accretion to the Tennessee shore.

The only evidence, as we read from the record, to the point that the land here in controversy is accretion to the Tennessee shore, to the Polsdorfer 5000 acres and the Williams 400 acres, is as follows:

Marsh Miller (p. 73) says: "When the island was washing so, a mud bar commenced making on the Tennessee shore (p. 74). He says the formation commenced at the Fortner house on the Tennessee shore; and the island was above the house. That the formation kept on increasing on the Tennessee shore as the island gave way. And that was the foundation of all that accretion. He says there was a little of this formation there in 1839, and a woodyard in that vicinity."

In cross-examination (p. 76) witness shows very clearly that the house which he calls the Fortner house was not that house at all, but a little one-room cabin on the original Tennessee

shore. At page 80 witness admits that as a general rule accretions to the shore slope toward the water's edge, and that the timber grows where the land forms.

This is all of the testimony on this point, unless the testimony of Capt. Drouillard (pp. 121–122, ans. 20, X-ans. 10) is to be construed as saying that the land was made to the Tennessee shore, instead of on the Tennessee side of the island. As we read the question and answer on p. 122 it simply is, that the island reappeared on the Tennessee side of the river. And that the accretions were on the Tennessee side instead of on the Arkansas side of the river.

It is uncertain, to say the least of it, what the witness means by "on the Tennessee side." But if it should be construed to mean that the accretion was to the Tennessee mainland, then it would be these two witnesses, without any sustaining circumstance or physical fact, against eleven witnesses with the facts, we have already recounted.

This testimony that the accretion was to the Tennessee shore is so overwhelmingly confuted by the witnesses that have been referred to heretofore, and the physical facts that have been arrayed before your Honors, that we do not think the question is a debatable one.

And yet this is the record upon which the trial judge peremptorily instructed for the plaintiff.

We submit that this was error.

In Schuchardt v. Allen, 1 Wall. 359–369, the court, through Mr. Justice Swayne, say: "A peremptory instruction is equivalent to a demurrer to the evidence. And such an instruction ought to be given whenever the evidence is not legally sufficient to serve as a foundation for a verdict. * * * "A demurrer to evidence admits not only the facts stated therein but also every conclusion which a jury might fairly or reasonably infer therefrom."

See also, Pleasant v. Fant, 22 Wall. 116.

In Ins. Co. v. Doster, 106 U. S. 30–32, the court say, through Mr. Justice Harlan, "where a cause fairly depends upon the effect or weight of testimony, * * * it should never be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

In R. R. v. Cox, 145 U. S. 593–606, Fuller, C. J., speaking for the court, said, "the case should not have been withdrawn from the jury, unless the conclusion followed, as a matter of law, that a recovery could not be had upon any view which could properly be taken from the facts the evidence tended to establish."

In Mt. Adams, &c., v. Lowery, 74 Fed. Rep. 470, Mr. Justice Lurton, speaking for the court, said: "Neither is it a proper standard to settle for a peremptory instruction, that the court after weighing the evidence in the case, would, upon a motion for a new trial, set aside the verdict. The court may, and often should, set aside a verdict, when clearly against the weight of evidence, where it would not be justified in directing a verdict." Citing Burton v. Thompson, 2 Burrow 664; 2 Salk. 646. And at page 476 the learned justice sums up the cases thus: "Both upon reason and authority there is a difference between the legal discretion of the court to set aside a verdict against the weight of evidence, and that obligation which the court has, to withdraw a case from the jury, or direct a verdict for insufficiency of evidence. In the latter case it must be so insufficient in fact, as to be insufficient in law; in the former case it is merely in fact, and it may be insufficient in law, or may have more weight and not enough to justify the court in exercising the control, which the law gives it, to prevent unjust verdicts, to allow verdicts to stand. * * * We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court on

weighing the evidence would upon motion, grant a new hearing. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence that he may determine whether the verdict was one which might reasonably have been reached. But in passing upon a motion to direct a verdict, his functions are altogether different; in the latter case we think he cannot properly undertake to weigh evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party. * * * It is certainly not his function to weigh the evidence for the purpose of saying how the verdict should go."

In Travelers Ins. Co. v. Randolph, 78 Fed. 764, Mr. Justice Harlan reviews this case and thoroughly concurs with it, saying "a peremptory instruction should not be given to the jury, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking such instructions; and a case cannot properly be withdrawn from the jury, because in the judgment of the court there is a preponderance of evidence in favor of the party asking the instruction."

A judge should not weigh or balance conflicting evidence, however strongly evidence on one side may in his judgment preponderate; that question is for the jury.

See also Lang v. Suter, 81 Ill. App. 192.

It is also well settled that where the evidence tends to contradictory conclusions though no conflict among the witnesses, a verdict should not be directed.

Mitchell v. McLaven, 51 S. W. 269.

See also—

92 Fed. 553. 93 Fed. 899. 78 N. W. 1084.

Under these authorities we insist that a reversal is inevitable in this cause.

And not only does this evidence show that a reversal ought to be had in this case, but from it, it is perfectly plain :

1. That Flour Island belongs to the State of Arkansas and has been a part thereof since 1823.

2. That it has never entirely disappeared.

3. That the accretions here claimed by the plaintiff were accretions to Flour Island and not to the Tennessee shore.

4. That if Flour Island entirely disappeared, it certainly reappeared as an island and not as accretion to the Tennessee shore.

And the grant from the State of Tennessee to the plaintiff's grantors could not, in the nature of things, cover the land here in controversy.

This proposition is stated by Mr. Gould on Water Courses (sec. 166 and cases in n.2): "In general, if an island growing out of the water has a fixed channel which separates it from the adjacent land, the owner of such land cannot claim the island as belonging to it by accretion.

In St. Louis, etc., v. Ramsey, 53 Ark. 314, the court says: "A gravel bar in the bed of a navigable river, * * * which is distinguishable from the bank by the absence of soil and vegetation, is not alluvion added to the land of the riparian owner, but belongs to the State."

In Cox v. Arnold, 31 S. W. 592 (Mo.), it appeared that "a portion of the fractional section bordering on a navigable stream was washed away by the current;" and that an accretion formed from an island in the river, and extended within the bounds of the section, but did not connect with the new shore line." The court held that the owner of the section had no title to any part of the accretion.

In Filmore v. Jennings, 78 Cal. 634, it is said: "The owner of an island, between two channels of a river, which, by a change in the course of a channel, has gradually pushed up stream as a result of natural accretion so as to cover the whole front of a riparian owner, * * * where the channel between the island and the mainland has become non-navigable except at high tide, is entitled to the accretion."

In the City of Victoria v. Scott, 29 S. W. 681, it is distinctly held that where the accretion is to the island, though it may gradually extend toward and finally reach the shore, it does not become the property of the shore owner, but is the property of the island owner.

See also—

Cooley v. Golden, 23 S. W. 100.

Hahn v. Dawson, 36 S. W. 233.

Benson v. Morrow, 61 Mo. 347.

Perkins v. Adams, 33 S. W. 778, was an action for land claimed as accretion to fractional section 10, lying in Holt county, Missouri. The evidence showed that in 1866 an island formed in the Missouri river, opposite said section 10, extending up and down the river. It first appeared as a sand bar. It increased from year to year. Willows and cottonwood of considerable size grew on it. Steamboats passed up and down the river on both sides of it. Finally the waters of the river withdrew entirely to the west or Nebraska side of the river, leaving a deep, wide slough between the island and the Missouri bank. Plaintiff claimed the land to the middle of the slough as accretion to his land. The defendant claimed that the land in suit was not accretion to the plaintiff's land, but an island or sandbar in the river.

In reversing the judgment for the plaintiff, the court said, *inter alia*, the trial court "erred in holding that the shore owner was entitled to the land formed in his front, whether formed by gradual accretions to the shore, or reliction formed

by the gradual receding of the river, or by the river depositing sand and earth on its bed as a bar or island and afterward connecting with the shore by the receding of the intervening river; and also erred in holding that the defendant was entitled to the island, only if formed on the west side of the center line of the main channel. The owner of lands on the bank of the Missouri river is not the owner of an island which springs up in the midst of the river, whether the island be on one side or the other of the thread of the main channel."

This case also holds that if one is entitled to accretions, he is entitled to them even though they *extend beyond what was once the middle thread of the river.*

In Hahn v. Dawson, 36 S. W. 235, the court says the instructions asked, towit: "If the land in controversy was originally formed in the Missouri river as an island, or sand bar, with a channel between it and the mainland, belonging to the plaintiff, and that by accretions to said bar or island it finally extended to the plaintiff's land, or if by the recession of the river from this intervening channel after the formation of the bar or island, the bar and the mainland became connected, it belonged to the plaintiff, was clearly erroneous, because it ignored the fundamental idea upon which titles by accretions is based, namely, that they must be imperceptible or gradual accretions to the plaintiff's land, or the gradual receding of the river therefrom. If the accretions were to the island on the south side, and by a change of the river they were thus brought together, such union of the two tracts did not make the island accretion to the mainland."

See also—

Reese v. McDaniel, 115 Mo. 145.

Cooley v. Golden, 117 Mo. 33.

Bennett v. National, etc., Co., 72 N. W. 507.

But not only is the trial judge in error but he gives erroneous reasons for his error.

At page 258 he says, "There is not a particle of evidence in this case of any avulsion, and, therefore, the increment belongs to Polsdorfer as riparian owner." *Non constat. Non constat* that if there is no avulsion, it follows that this is accretion to the shore owner's land. Of course there is no avulsion. A change of the course of the river from one side of the island to the other, not being an avulsion. If, however, that is avulsion, the statement is confuted by the whole record. The statement that there is not a particle of evidence in this case that there is any avulsion may be perfectly true, and yet the consequence that the trial judge says flows from this, cannot be true in face of the swearing of eleven witnesses and a state of physical facts that cannot be gainsaid, and is not attempted to be denied in this record.

In other words, instead of the fact being as stated by the learned trial judge, that as there is no avulsion (in the sense in which the court used the word) proven in this case, therefore the accretion is accretion to the shore owner, the fact is that it is accretion, but not accretion to the shore owner's land, but accretion to the island owner's land, and to the island owner's land alone.

If there is any truth in human testimony, if there is any reliance to be placed upon the laws of nature, this record demonstrates that fact absolutely and conclusively.

The only witnesses that plaintiff introduces on this point, towit, Miller and possibly Drouillard, in their testimony make out a change of the boat channel of the river, from one to the other side of the island. They both show by their testimony that there was a change in the navigable channel of the Mississippi River from the Tennessee to the Arkansas side of this island somewhere about 1840. That change was so complete, in one rise of the river according to their testimony, that no boat could run on the Tennessee side of this island from that time on; and that the land filled in between the

island and the Tennessee shore in consequence of that change.

But in fact this was not an avulsion nor a sudden reliction.

An avulsion is in the nature of a landslide. Or as some of the authorities seem to hold, a sudden cutting off of a part of one man's land and attaching it to another by the sudden change in the course of a river.

It is "a tearing loose (*avello*), a tearing away" —as in horticulture, a limb from a tree.—Plin. 17, 10, 9.

Eubœa avulsa Bœotiæ.—Plin. 4, 12, 21.

Justinian Institute, Lib. 2, Tit. 1, sec. 21, says: "It is where the violence of a river bears away a portion of your land and unites it to that of your neighbor"—(*et vicini prædio attulerit*). And he says: "The land undoubtedly still continues yours"—(*palam est eam tuam permanere*).

"It is the removal of a considerable quantity of soil from the land of one man, and its deposit on, or annexation to, the land of another, suddenly and by the perceptible action of the water." 2 Wash. Real Property 452.

In such case the property belongs to the first owner.

Bracton 221.

Reliction* (*reliquo*) is an increase of land by the retreat of

* It may not be uninteresting to give here Sir Matthew Hale's definition or description of alluvion, reliction, and islands:

In his De Jure Maris et Brachiorum ejusdem, Ch. 4, he says: "The King has title to all *maritima incrementa*—(1) *per projectionem vel alluvionem*; (2) *per relictionem vel desertionem*; (3) *per insulæ productionem.*

"1. Increase *per alluvionem* is where the sea, by casting up sand and earth, doth by degrees increase the land and shut itself out further than the ancient bounds went. The reason why this belongs to the Crown is, because where there is now dry land was formerly part of the very *fundus maris*, and consequently belonged to the King. But indeed, if such alluvion be so insensible that it cannot be by any means found that the sea was there, *idem est non esse et non apparere*, the lands thus increased belong, as a perquisite, to the owner of the lands adjacent.

"2. Increase *per relictionem*, or recess of the sea. This doth, *de jure communi*, belong to the king; for, as the sea is parcel of the waste or demesne, so of necessity is the land that lies under it, and therefore it belongs to the King, when left by the sea.

"3. Increase by islands arising *de novo* in the King's seas, or the King's arms thereof." (Strange to say, none of these authors refer to this as the *circumluvio* of Cicero. *Jura alluvionum et circumluvionum.*—Cic. de Oratore 1, 38, 173.) "These, upon the same account and reason, *prima facie*, and of common right,

the sea or river. If sudden and sensible, the land belongs to the State; if insensible, to the adjacent owner.

Woolrych Water Courses 29–36.

9 Conn. 41. Vin. Abr. 574.

1 Hawks N. C. 56. 1 Gill & J. 249.

The change of the boat current of a river from one side of an island to the other is neither.

And while we say it is true that this is not a case of avulsion, we insisted before the trial judge and insist here, that if it is avulsion or sudden reliction, the land here in controversy would not belong to the shore owner but to the State. But should it be concluded from the plaintiff's testimony, leaving aside all the defendant's testimony, that this was a case of reliction—the recession of the water, whereby the bottom is left bare—in such case, if the reliction is gradual, the rule of alluvion applies; and in this event the alluvion would be to the island on this whole record and not to the shore owner. But if the reliction is sudden the relicted land would belong not to Polsdorfer but to the State of Tennessee.

Boorman v. Sunnuchs, 42 Wis. 245–246.

2 Blackstone's Com. 262. 23 Wallace 67.

In the Wisconsin case, after laying down the rules as above stated, the court say: "The plaintiff should have given the court more definite information in the progress of the falling or recession of the water. He should have shown the several stages of the process during longer or shorter periods of time as determined by the width of the strip uncovered, or by comparison with the bank, or other known and fixed objects, to the end that the court might have some more definite and satisfactory data upon which to determine the character of

belong to the king; for they are a part of the soil of the sea that belonged before in point of propriety to the King; for when islands *de novo* arise, it is by the recess or sinking of the water, or else by the exaggeration of sand or slubb, which in process of time grows from land environed with water."

See 6 Cow. 541–543.

the reliction." That is, the burden is on plaintiffs to show that the reliction, if reliction there is, was of that character that it plainly belonged to them.

And in the 23 Wallace case (St. Clair Co. v. Lovingston) the court say, "But if the alluvion be sudden or considerable it belongs to the State."

So that, if in this case the fact which the plaintiff's testimony might be construed as tending to show, to-wit, that the lands here in controversy were produced by avulsion or by sudden reliction, or as the supreme judicatory of the country says, if they are alluvion and are considerable (and the evidence here shows they are from 3000 to 5000 acres, pp. 68, 142, 184), in all of these events, if the land was within the State of Tennessee it would belong to the State, and in not one of them, by any possibility, could it belong to the shore owner or the plaintiff in this case.

So that if this is a case of avulsion the plaintiff can not recover. If it is a case of sudden reliction the plaintiff can not recover. And if it is a case of alluvion the plaintiff can not recover. Because in the two former cases the authorities are all one way, that the property would be the property of the State. And in the latter case the evidence demonstrates that alluvion—the accretion—was all to the island, and not to the shore owner's land.

But the learned trial judge continues, "from the day of Bracton, who got it from the Institutes of Justinian, to this day, treaties, acts of parliament, judgments of the House of Lords and other courts in the mother country, our Congress, the Legislatures of the States, the Supreme Court of the United States and the State of Tennessee, have approved the rules of alluvion laid down by Bracton, as essential to the peace of nations and the repose of society among its individual owners of land. The rule was established and is maintained to forbid the disturbance of possession of alluvion by just such

evidence, inconclusive and inconsequential, as the defendants have offered in this case. Disputants are not allowed to go about the identification of the particles of soil composing the alluvion in order to claim it, as one would the fleshmarks of horses and mules, the identity of which comes in question. The only inquiry permitted, is that as to the process by which the changes have been made, whether it be a sudden or imperceptible one. No sudden process being proved in this case, the State of Tennessee and Polsdorfer are entitled to this Flour Island we see on the map, which is in evidence. The State of Tennessee, politically, by a possible, though not clearly proven, shifting of the boundary line between Arkansas and Tennessee; Polsdorfer by the State's grant in 1837, as the proprietor of the bank, and by the imperceptible accretion thereto of this alluvion called Flour Island.'

If Bracton, or any court of England or America, or any other authority, ancient or modern, has ever laid down the rule that where eleven witnesses swear positively that the accretions in controversy are accretions to the defendant's island and not to the plaintiff's shore land, and all the physical facts in the case, the lay of the land, the growth of the timber, the river lying up against the old original bank, the bluff banks themselves confirm this, we have not been able to find such authority.

Nor have we been able to find any court anywhere to say that such evidence is either "inconclusive or inconsequential." Nor any court that, instead of leaving the evidence to the triers of facts, itself decides that overwhelming evidence is no evidence. The question whether land formed in the changing bed of a river to a tract formerly on the shore of the river, or is newly made land unattached thereto, is a question for the jury. Price v. Hallett, 38 S. W. 451.

The question of whether the facts of this case made the land in question alluvion, and if alluvion, alluvion to what—was

for the jury. Or if it was reliction or avulsion—who owned the same, was for the jury. Or, especially, was the land in controversy alluvion to plaintiff's land? Did he under the evidence make out a legal title in fee to the land sued for? All of these were questions for the jury, certainly, on this record, and under the authorities, not for the court to decide.

As a matter of fact Bracton, writing in a country where the law of accretion was applied only to the imperceptible increase to the seashore or to the shore of a navigable stream where the *tide ebbed and flowed*, and in a country where there were no large fresh water rivers, could not and did not lay down the rule as it now exists in the United States, as laid down by most of the State courts, and certainly by the courts of Tennessee and Arkansas.

Bracton, Lib. 2, ch. 2, lays down the rule thus: "If an island arises in the middle of a river it belongs in common to those who have estates on the opposite shores; but if nearer one bank than the other, it belongs to him who is proprietor to the nearest shore."

We quote both Bracton and Justinian:

Henricus de Bracton, Vol. 1, Liber 2, Chapter 2:

"Habet etiam locum eadem species accessionis in insula nata in flumine, quae, si quidem mediam partem fluminis teneat, communis est eorum, qui pro indiviso ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cujuscunque fundi, quae latitudo prope ripam sit; quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident. Si autem insula in mari nata sit, quae raro accidit, occupantis fit, non tamen credas proprium alicujus agrum in formam insulae redactum, insulam esse, ut ecce, flumen dividitur in superiori parte et circuit agrum alicujus, et demum infra unitur, quo casu ejus erit ager cujus prius fuerat. Cavendum quoque erit in metienda vicinitate insularum, quia potest quis in hoc de facili decipi. Ponatur igitur punctus quidam in medio inter

"The same species of accession takes place in the case of an island which is formed in a river, which if it occupies the mid-channel, is common to those indivisibly," (i. e. undivided) "who on either side of the stream have farms on the edge of the bank, according to the width of the farm on the edge of the bank; but if it be nearer to one side it belongs to those owners who on that side have lands on the edge of the bank. But if an island is formed (born) in the sea, which rarely happens, it belongs to him who may occupy it, nevertheless you are not to suppose that the domain of any one reduced to the form of an island is an island. As for instance a river is divided above and encircles one's field and then united below, in this case the field belongs to him whose it had formerly been. Care should be taken also in measuring the nearness

untrumque agrum, et secundum hoc, si insula citra punctum sit, vel hujus tantum, vel illius tantum erit. Si autem sit et citra punctum, et in ipso puncto, et ultra, tunc pro indiviso, communis erit, ut tantum mihi de ipsa insula cedat, quantum continetur a medietate puncti usque ad agrum meum, et sic fiat in persona vicini quoad divisionem. Et videtur quod vicinitas et remotio insulae considerari debet secundum principium nativitatis suae, et inde erit, quod si inter insulam, quae mihi proximior est, et contrariam ripam vicini, quae est ultra flumen, alia sit nata insula, mensura fiet a mea insula et non ab agro meo. Et haec omnia tenenda sunt in insula, quae alvei solo adhaeret, et non quae virgultis sustentatur. Si autem insula rotunda inveniatur, difficile erit eam metiri, hoc tamen observetur, quod omne, quod propinquius est, mihi cedat, et ita vicino cedat, quod ei vicinius erit, et hoc nunquam fallet. Habet etiam locum haec in agris non limitatis; nam in limitatis non habet locum jus alluvionis. Sunt autem limitati, qui assignantur aliquibus certis locis et certis terminis, ubi scitur, quid cui sit datum, quid retentum et relictum. Praeteria agris limitatis non cedit insula ratione vicinitatis in flumine publico imo conceditur occupanti, et per consequens regi propter suum privilegium. Habet etiam locum eadem species accessionis in alveo fluminis, a flumine derelicto. Cedit enim eis, qui prope ripam fluminis praedia possident, pro modo scilicet latitudinis cujuscunque agri, quae latitudo prope ripam sit."[1]

of islands, because any one may be easily deceived in this. Let a point, therefore, be fixed midway between the two lands, and according as the land is within the point, it will be the sole property of the one or the other; but if it be within the point, and on the point, and beyond the point, then it will be common indivisibly," (i. e., undivided), "that so much of the island itself shall devolve to me, as much as is contained from the middle of the point to my land, and it shall be similarly done toward the person of my neighbor, as regards the division.

And it appears that the nearness or remoteness of an island ought to be considered in connection with the origin of its nativity (beginning), and so it may be that, if between the island, which is nearer to me, and the opposite bank of my neighbor, which is beyond the river, another island springs up, the measurement ought to be from my island and not from my field. And all these things are to be maintained in an island which adheres to the soil of the channel, and which is not supported by shrubs. But if the island be found to be round, it will be difficult to measure it; this, however, is to be observed, that everything which is nearer (my land) devolves to me, and so, also, what is nearer to my neighbor, accrues to my neighbor; and this (rule) never fails. But this holds place in case of land which is not limited, for in the case of land limited, the right of alluvium has no place. But lands are not limited which are assigned to individuals in certain localities and by certain boundaries, where it is known what is given to each, and what is retained or left. Besides, an island in a public river does not accrue to limited land by reason of neighborhood; on the contrary, it belongs to the occupier and consequently to the sovereign in virtue of his prerogative. The same kind of accession takes place in the bed of a river from the river leaving it. For it accrues to them who possess farms on the bank of the river, according to their respective fronts on the bank."[2]

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[2] Gaius I, 70, 71, 72, p. 275, is to the same effect. Also Ulpian I, 19, sec. 13.

Institutes of Justinian — Title, De Alluvio, Secs. 20 and 21, page 85:

Sec. 20. Praeterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adici quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo momento tempori adiciatur.

Sec. 21. Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere.

Sec. 20. Moreover, an addition which the river makes to your land by alluvion is yours by the law of nations, and alluvion is an imperceptible increase — that being considered to be added by alluvion which is added so gradually that you cannot perceive how much is added at each instant of time.

Sec. 21. But if the violence of the river force away a portion from your field and carry it to the field of your neighbor, it is clear that it remains yours.

From all of which it is clear that Bracton's law does not apply in this age and country. But if we broaden Bracton's navigable streams to any fresh water river where boats can run, then Bracton is not only not an authority for his Honor's position, but is directly against it, and in our favor. And so is Justinian.

Nor have the Supreme Court of the United States, nor the Supreme Court of Tennessee, approved the rules laid down by Bracton, as interpreted by his Honor, as essential to the peace of nations and the repose of society among its individual owners of land.

On the contrary, these courts have held that it is essential to the repose of society among its individual owners of land that an entirely different rule from that obtains.

At this day in a navigable stream it would be held in most of the United States that the island in midstream would not belong to the shore owners opposite the island, but to the States lying on either side; and if it was nearer one than the other, it would belong to the State nearest the island. And it is so held by the Supreme Court of the United States, of Arkansas and Tennessee.

Elder v. Burns, 6 Hump. 368.
Morton v. Nance, 3 Head 649.
Stewart v. Clark, 2 Swan 15.
St. Louis v. Ramsey, 53 Ark. 314.
Wallace v. Driver, 61 Ark. 429.
Barry v. Keokuk, 94 U. S. 336.

Nor is the court more fortunate, if it was of any consequence where he says "disputants are not allowed to go about the identification of particles of soil composing the alluvion in order to claim it, as one would the flesh marks of horses or mules." And this on page 257: "The increment of the sea or rivers, called alluvion or accretions, is not in any legal sense the fruit of the land, like apples growing from a tree, or fungus on plants, but it is the fruit of the waters," etc. The Supreme Court of the United States in the 23 Wallace case above cited does not agree with the trial judge in this, for it says that the alluvion attaching to the shore belongs to the shore owner. "It is the same with that as an *owner of a tree to its fruits*, and of the *owner of flocks and herds to their natural increase.*"

The court then proceeds to decide, without the intervention of a jury, and against all the evidence in the case, that Flour Island belongs to the State of Tennessee; and that by imperceptible accretions Polsdorfer, by his grant from the State of Tennessee in 1837, became and is the "owner of this accretion called Flour Island."

It was not left to the jury to say whether the Flour Island of 1823 still existed in part, and that the land in controversy was accretion to that land, as it ought to have been; it was not left to the jury to say whether the island was partially or entirely washed away, and, if entirely washed away, whether it reappeared on the Arkansas or Tennessee side of the river, and, in either of these events, if the land here in dispute was accretion to this reappearing island, the plaintiff could not recover. It was not left to the jury from the facts to say, that if this were a case of avulsion or sudden reliction, the land would belong to the State of Tennessee and not to Polsdorfer the plaintiff. It was not left to the jury to say that the only event in which the plaintiff could recover was in case they found upon the preponderance of the testimony that the land here in controversy was added to Polsdorfer's

grant and the Williams grant by imperceptible accretions to the shore in front of those two grants.

All little matters of that kind the court swept out of its path by saying that Flour Island belonged to Tennessee, and because Polsdorfer's claim was founded upon a grant from the State of Tennessee in 1837 of 5000 acres on the Tennessee mainland, that he was the "proprietor of the bank, and by the imperceptible accretion thereto of this alluvion called Flour Island, Polsdorfer became the owner of Flour Island."

In short, we submit that every fact found by the court should have been submitted to the jury, and it was error not to submit it to the jury.

It would have been reversible error if the jury had found for the plaintiff on a proper charge, for if plaintiff's testimony should be construed to show that the case was one of avulsion or sudden reliction, the verdict must have been for the defendant. If the defendant's testimony was the truth of the case the plaintiff could not recover.

There is no state of facts or legitimate deduction from any state of facts in this case that would support a verdict for the plaintiff; and therefore if there had been a peremptory instruction for the defendant it would have been correct.

Another and the only remaining view possible is contained in our instruction asked (pp. 269–270), which is as follows:

"If the fact is established that the land claimed by the defendant Ayres was surveyed in 1823 as part of the Territory of Arkansas, and that at that time and in 1837, when the Woodfolk grant issued, the main channel of the Mississippi River was on the east side of that island, it would be first United States land, and then on the admission of Arkansas it would belong to and become a part of the State of Arkansas.

"If, about the years 1839–40, or at any other time, the main channel of the Mississippi shifted from the east side of that island to the west side, the title of the island as part of the State would not be affected by that change, but the island

would remain part of Arkansas.* If the law is that when the river shifted from the east to the west side of the island containing the four sections of Troy township, in Arkansas, the boundary became fixed at the then center line of the abandoned channel, no more to be affected by accretion or reliction or otherwise as between the States, then I ask the court to charge that each State had title from that time to that line, and when the channel filled to that line, the land west of that line was Arkansas and the land east was Tennessee.

"If the line between the States became fixed to a certain point at the time of the cut-off, then I ask the court to charge that when the accretion from the Arkansas island reached that point, any accretion on the bed of the Old River east of that fixed line would be on land belonging to Tennessee under the water, and could not become the land of Polsdorfer while wholly separated from it by the ungranted land belonging to the State lying in the bed of the river,† neither could it afterward when met by accretions from the Tennessee shore suddenly become all his to that line between the States.

"If in the process of filling that channel the accretion from the Arkansas shore reached and crossed that line while there remained a body of water over that portion of the bed of the river which belonged to Tennessee as ungranted land, then that land at that time became by that cut-off all at once the property either of Polsdorfer or else it remained the property of the State as ungranted just as it was ungranted State land before that cut-off. If that be the law I ask the court to charge that Polsdorfer can not acquire title from the State by the sudden change of the river from one side of the island to the other—any more than Tennessee can acquire title to the island by the sudden change of the main channel from the one side to the other. The title to the bed of the stream

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* If the boundary river between States forms a new and distinct channel, the dominion and jurisdiction of the respective States are not affected.

Gould on Waters, p. 320.

† Where claimant's lands are separated from accumulated accretions by the land of another, however narrow the intervening strip, or whatever the size of claimant's tract behind it, the accretion does not belong to the claimant.

Sweringen v. City, etc., 52 S. W. 346.

having been, before the change, the property of the State as ungranted land, remains after the sudden change the property of the State as ungranted land, and does not become by the sudden change the property of Polsdorfer. In other words, if the State could not acquire title to the island by the change, so Polsdorfer could not acquire the title to the bed of the channel by the sudden change.

"I ask the court to charge that when the land in the old channel, by the change, became no longer navigable, it became so with the title to it vested in the State as ungranted land. If the State was the owner of both sides of the pond or lake, the lake would be subject to the law of accretion, and the owner of one side of the lake would have the same right to the accretions to his shore as the owner of the other side.

"If the respective owners were States the same rule would apply, and the accretion to Arkansas would be as much hers as those to Tennessee would be hers."

This we conceive disposes of the case so far as the reversal of the case is concerned.

But, as if the case is reversed, there may be another trial, this court is asked to rule on other errors of the trial judge, so that there will not be a repetition of these errors.

III.

Our next proposition is that the court erred in excluding this testimony from the jury.

In order to show the fact that original Flour Island had not all washed away, the defendant introduced the testimony of himself and David Laurence to the fact that in 1895 they cut a cottonwood tree on the island, and the concentric rings in the tree numbered 55 or 56. And, therefore, that the tree was 55 or 56 years old. Which, of course, would show that the tree began to grow on the island in 1848 or 1849. And, therefore, that the testimony of Miller, who swore that the island entirely disappeared in 1850, and the testimony of Laney that the island entirely disappeared in 1864, could not possibly be true in fact.

Thereupon the plaintiff read the deposition of James Stewart (pp. 124–128) to show that the concentric rings were not reliable to show the age of a tree.

Now, to show the incorrectness of this expert witness' testimony and also to show the correctness of our theory, the witness David Laurence was introduced and would have testified to this state of facts: That when he and Mr. Ayres cut down the tree and counted the concentric rings, in the year 1895, there arose a discussion between them about the concentric rings being a reliable indication of the age of the tree. And the witness then said to Ayres, I can test that matter at once. In the year 1860, thirty-five years ago, my brother and myself bored into a cottonwood tree on the mainland, and on the same character of soil as this, for water. And when we got all the water we wanted we plugged up the hole. (The witness explained that there were certain classes of cottonwood trees, which woodmen in that country knew, which contained quantities of drinking water, and that in very dry weather when water was scarce, they could, by boring a hole in one of these trees, get a supply of good drinking water.) He then said to Ayres, I can find that tree. And by cutting a chip from it where we had plugged it up, and counting the number of rings on the chip, I can tell whether it shows accurately the number of years since we bored into it, and thereby test the accuracy or inaccuracy of the concentric rings as showing the age of the tree Witness says he found the tree, cut the chip out where he had bored into the tree thirty-five years before, and found just thirty-five rings on the chip.

Upon objection this evidence was excluded upon the ground of incompetency and irrelevancy, and we excepted. p. 248.

That this was original evidence and entirely competent evidence for the purposes for which we proposed to introduce it, we submit to the court is entirely clear.

It would go in confutation of what Stewart testifies to, and in confirmation of what is admitted universally to be the fact, that the concentric circles on a tree show accurately the age of the tree, with some rare exceptions. Further, it was evidence that the exception did not exist in this particular case —it tending to show that no exceptional season had occurred in that period and neighborhood.

The testimony of Laurence as to the tree and the rings or growths was admissible as proof of facts pertinent to the matter on trial from which the jury were to draw their inferences. As such it was not in the nature of expert testimony, but was the normal and originally legal testimony to which the doctrine of expert evidence is an exception.

The general rule is that only facts are admissible, but opinions of experts is an exception. The jury is to draw the inference from facts in general, but an expert is allowed to draw inferences. This is exceptional—abnormal.

The facts pertinent to a matter on trial are always admissible. The inferences from those facts are only so under particular circumstances—one of which is where the witness has acquired knowledge from a large experience that gives him a peculiar insight, that makes his inferences instructive. But the introduction of such testimony is in aid of the jury's judgment, not in exclusion of it.

IV.

The court erred in excluding the following testimony:

Defendant claims to have bought the land here in controversy from John Lovewell and wife, in the year 1884. And defendant proposed to show by Lovewell and William Randall (pp. 176–177) that while Lovewell owned the island he sold some standing timber on it to one Petty. That J. C. Marley claimed the price of the timber, which was $80.00. And that Petty, without the knowledge of Lovewell, paid over the $80.00

to Marley. As soon as Lovewell was informed about the matter he wrote Marley that if he would come to Osceola (Arkansas) he would show him the records there, showing that he (Lovewell) had title to the island, the land here in controversy. That Marley declined, but that the two arranged a meeting at Fort Pillow. They met and discussed the matter, and as a final settlement of the controversy, Marley said, "Mr. Lovewell, if you will let me retain the $80.00 I will give up any claim I may have to Flour Island from this time forth." Lovewell agreed to this. And when he sold to Ayres and Ayres asked him about the title to Flour Island, he told him the source of his title, and then said in reply to Ayres' question whether he ever had any trouble about the title, "I have never had any difficulty or trouble about it, except with Mr. Marley." And he then stated the trouble and the settlement as above set forth. p. 272. And Ayres made the purchase. p. 272.

The witness Randall confirms all that Lovewell said about the settlement. p. 177.

This, the defendant claimed, was an estoppel on Marley and Polsdorfer, Marley's privy, to set up any claim of any accretion to the 5000 acres or any claim that this land is accretion thereto. p. 272.

The objection (p. 178) to the introduction of this testimony was (1) that it was a conveyance of land not in writing and could not be introduced for that reason, and (2) because Polsdorfer was not party to it and was not affected by it and had no notice of it.

Which objection was sustained and Ayres excepted.

Needless to say as to the second objection, that Polsdorfer was Marley's privy in estate, and was thereby a party to the settlement, affected by the settlement, had notice of the settlement, and was bound by the settlement.

Needless to say, also, that it was not necessary that the settlement should have been in writing in order to bind Marley, and to constitute an estoppel on Marley and his vendee.

In Bowles v. Smith, 1 Shan. Tenn. Cases at page 152, the Supreme Court, speaking through Judge McKinney, say:

"There is proof in the record tending to show that prior to the date of entry on which plaintiff's grant is based, McIver, after surveying various distinct portions of the better land within the bounds of the 40,000-acre grant to Donelson and Terrell, stated to different persons that he had appropriated as much of the lands as his grant called for, and did not want the remainder of the land.

"It is true as a general proposition, that a party can not be divested of the titles to lands by a mere parol disclaimer. But, if, in addition to such disclaimer or abandonment of title, he encourages or induces another to expend his money in acquiring a title by entry and grant to the land thus disclaimed, we are of opinion that he and *all persons claiming under him subsequent to such disclaimer*, would be estopped to assert any claim or title to the land thus appropriated by another. And, of course, the title of the former owner, in such a case, could not be regarded as an outstanding title."

Also Hamilton v. Zimmerman, 5 Sneed 41.
Cooley v. State, 2 Head 608.
Tipton v. Powell, 2 Cold. 23.
Caruthers v. Crockett, 3 Shan. Cas. 629.
85 Tenn. 154. 92 Tenn. 348. 98 Tenn. 561.
100 Tenn. 150. 2 W. M. Dig. 1492.

In 3 Shannon Cases, *supra*, the court defines estoppel to signify that a man for the sake of good faith and fair dealings, could be estopped from saying that to be false, which by his means had been accepted for the truth, when by his acts or representations he has led others to act.

See also 11 Heis. 68. 11 Hump. 433.
3 Head 173. M. & Y. 333.
10 Yer. 133. 2 Her. on Est. sec. 1069.
Same, page 1170 and cases cited.
Erhardt v. Boar, 3 McCrary 19.
Nelson v. Claybrook, 4 Lea 687.
And Broyles v. Nolan, 59 Tenn. 191.

It is well settled that admissions or silence of an adverse claimant present during a pending purchase estops him from setting up his claim.

The McIver case above quoted from shows that the presence of the claimant is not the controlling fact. But his admission and its effect on the mind of the buyer is the controlling fact.

In that case there was a public disclaimer of the title, and a purchase was made with a knowledge of that disclaimer. And the estoppel was properly held to bar his title just as much as if he had been present at the sale and admitted that he had no title.

It is the fact of the admission, and not the time of it or manner or proof of it, that is to be considered. The question is, did he admit the invalidity of his title? If he did, and that is proved, and if this was reported to the buyer and that is proved, the estoppel is operative. If the admission influenced the buyer as an inducement or any part of the inducement to his purchase, it is immaterial what was the medium of evidence by which the fact is made to appear. And any evidence which tends to establish the act is admissible. The jury is to judge of its sufficiency.

It must not escape notice that in Marley's contract with Hobbs, he, in apt words, restricts the operation of the contract "on the western boundary, where the river was originally called for," and only quitclaims as to land between that point "and where river now actually is." p. 22. And in Marley's deed to plaintiff he says: "And I do warrant said title, to as much as 5000 acres to pass to J. H. Polsdorfer." p. 35. And in Williams' deed to Polsdorfer, after warranty as to 400 acres, he says he "also conveys any lawful right he may have to the accretions or alluvion accrued in front of said 400 acres, to said John H. Polsdorfer." p. 32.

On the face of his deed, therefore, Polsdorfer is notified that the vendors will not warrant the title of the land sold, outside

of the 5000 and 400 acre tracts; and it may be stated further that neither plaintiff nor Marley ever paid, nor was the land here in controversy ever assessed for, taxes in Tennessee, so far as this record shows—the only assessment being on the 5000 and the 400 acres. pp. 43. 69. Nor does this record show that Polsdorfer ever paid one cent of the purchase money for the 5000 acres even.

But on another and independent ground it is admissible, even if there had been no sale. It was a matter of boundary. Was Old River the western boundary of the Woodfolk grant or not? This was a matter in dispute. Nothing is better settled in Tennessee law than that an agreement by parol to settle an uncertain boundary, or a parol settlement of a boundary, is valid and binds the parties to it.

Wilson v. Hudson, 8 Yer. 397.

Spears v. Walker, 1 Head 166.

On these authorities and on the proof on the various propositions above set forth and discussed, we claim that the court not only erred in the instructions actually given, but erred in refusing to give the instructions asked on pp. 259–260–261–262.

V.

The last series of errors of the trial court pertains to the judge's action and ruling with regard to the title which the defendant set up in court below to the land in controversy.

The pleas of the defendant are the general issue and statute of limitations of seven years, p. 7.

To defeat the plaintiff's recovery it was sufficient to show that he failed to make out a fee simple title; or that the property did not belong to either the plaintiff or defendant; or that it belonged to the defendant.

The defendant undertook to show in support of his defense among other things, that the title was in him. To this end he read in evidence a warranty deed from John A. Lovewell

and wife, to him on the 2nd day of August, 1884, p. 149, which deed conveyed to him "all of fractional section 17, all of section 18, all of section 19 and all of section 20, in township 12, range 12, east, *together with all the accretions thereto attached or belonging.*"

The defendant then introduced and read to the jury, tax deeds to all these sections of date June 30, 1897, pages 152 to 155 inclusive.

Under the Lovewell deed defendant says that having contracted with the United States Government to furnish it 50,000 sticks of timber, as soon as he bought the land here in controversy from Lovewell, he began to cut this timber off of this land and at other points along the Mississippi River, in order to comply with his contract from the Government. That in 1884 and 1885, without disturbance from anybody, he cut considerable timber off this island under his contract. That he sold brush off the land in controversy, to Hunter & Frey, pages 211–212, and recovered the $400 in the Coleman suit from them for it; had another controversy with Williams about brush cut off the island, in which Williams paid over the money, page 213; had a chancery suit with Hunter & Frey for other brush cut off the island, in which he defeated them and collected his money, page 213, (and by the way we were entitled to the decree in that case before the jury, page 227 to 229, which the court excluded and to which we excepted). This latter suit was for brush cut by Hunter & Frey on the island in 1893. So in 1884 Ayres took actual possession of the land here in controversy, and successively and successfully maintained that possession—such possession as overflowing land is susceptible of—from that d te up to and including the year 1893.

In 1891 or 1892 Ayres put five or six tenants on Flour Island, and they built houses there, holding the land for him,

pages 214–215; in short, from the time he bought and took the possession in 1884, he exercised all these acts of ownership over the property, and when his contract about the timber was finished, in 1885–86 until 1889, he said he would go over to the island every once in a while to see if there were depredations on it. p. 218. He says, on page 216, that it was difficult to keep anyone on the island because it badly overflowed.

So that we submit that under a deed purporting to convey a fee simple title, the defendant has shown more than seven years' actual possession of the land, or some part of the land in controversy.

And this in Arkansas gives a title in fee.

Sandels & Hill's Ark. Code, sec. 4815.

Ferguson v. Peden, 33 Ark. 421.

41 Ark. 45, 58 Ark. 142, also 151; 44 Ark. 479.

Indeed, under sections 4819 and 6634, S. & H. Ark. Code, defendant acquired a good title in two years after he took possession.*

But under the tax deed set forth at pages 152-155, defendant got a good title to all of sections 17, 18, 19 and 20, irrespective of what had been previously done or not done, and without aid from the statute.

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* These sections read:

Sec. 4819. No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or commissioner of State lands for the non-payment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the non-payment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it appear that the plaintiff, his ancestors, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action.

Act January 10, 1857, sec. 1. See 30 Ark. 44. 32 Ark. 131. 57 Ark. 523. 58 Ark. 151. 60 Ark. 169.

Sec. 6634. All actions to test the validity of any proceeding in the appraisement, assessment or levying of taxes upon any land or lot, or part thereof, and all proceedings whereby is sought to be shown any irregularity of any officer, or

VI.

The court erred in excluding the plat from the office of the Commissioner of State Lands at Little Rock.

This was a plat and survey made by Daniel Miller of fractional section 24 on the Arkansas shore and fractional sections 17, 18, 19 and 20 (on island) in Mississippi River, purporting to be certified by the Commissioner of State Lands of the State of Arkansas; and also the paper marked exhibit "O.' These are found at page 148 of the transcript of this cause.

That was an office paper.

S. & H. Arkansas Digest of Statutes, secs. 4476, 4479, 4484, 4486.

The paper was properly certified by the authorities under the statutes of the United States.

It is evidence that the land in controversy was a part of the State of Arkansas.

It is evidence of the claim of the State of Arkansas that it was a part of her territory, and part of a line of proofs of continued assertion of title from the time Arkansas became a State.

VII.

The court erred in refusing to appellant the benefit of the record of the circuit court of Mississippi county, Arkansas, showing the sale of the four fractional sections 17, 18, 19 and 20 to John A. Lovewell, the grantor of defendants. pp. 241–247.

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defect or neglect thereof, having any duty to perform, under the provisions of this chapter, in the assessment, appraisement, levying of taxes, or in the sale of lands or lots delinquent for taxes, or proceedings whereby it is sought to avoid any sale under the provisions of this chapter, or irregularity or neglect of any kind by any officer having any duty or thing to perform under the provisions of this chapter, shall be commenced within two years from the date of sale, and not afterward.

32 Ark. 131. 46 Ark. 96. 53 Ark. 204. 55 Ark. 192. 52 Ark. 400.

If this was a valid record, it was evidence of title.

If it was invalid, it was evidence of exercise of jurisdiction of the State of Arkansas over the property in controversy.

It was perfected by lapse of time.

VIII.

The court erred in excluding from the jury the deed from the commissioner to John A. Lovewell. pp. 145–148.

At page 148 the court below allowed the deed to be read, but withdrew it from the jury at p. 247. This was error.

The deed, if a valid deed, showed a good title in the defendant. It was a deed valid upon its face.

S. & H. Arkansas Digest, section 6623.

No proceeding to attack it was filed within two years.

Ibid 6634.

If the deed was invalid, it was good as color of title.